

The Impact of *United States v. Bestfoods* on Parent Liability Under CERCLA: When a Door Is Closed, Look for an Open Window

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In 1999, the United States Supreme Court decided United States v. Bestfoods, which held that CERCLA liability could be applied derivatively to a parent corporation for the pollution of a subsidiary only when, under the traditional common law tests, the corporate "veil" of the subsidiary could be pierced. After tracing out the purpose and history of CERCLA and the common law ability to pierce the corporate veil, this Comment argues that the Bestfoods decision correctly applied common law veil-piercing standards to derivative CERCLA liability. Further, it argues that an issue which the Supreme Court failed to address—the standard of veil piercing that should be applied—can be resolved by the creation of a comprehensive federal veil-piercing standard.

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹ in an effort to clean up hazardous waste contamination located throughout the United States.² One of the main goals of the statute was to hold entities who were responsible for placing the contamination at a site liable for the costs of eliminating the waste and the risks associated with it.³ CERCLA addressed who could be potentially liable parties for such clean up costs.⁴ However, CERCLA did not specifically include parent corporations within its definition of liable parties.⁵ Due to this omission, the circuits are split over whether a parent corporation could be liable under CERCLA for actions taken by its subsidiary in the operation of a facility when the traditional exception to limited liability, piercing the corporate veil, does not

* This Comment is dedicated to my husband, Nathan D. McClung, and my parents, Timothy and Patricia DeMonte. Thank you for your love and support.

¹ See The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–9675 (1994 & Supp. III 1997).

² See *infra* notes 18–19 and accompanying text (discussing CERCLA's purpose and goals).

³ See *infra* note 19 and accompanying text.

⁴ See CERCLA § 107, 42 U.S.C. § 9607 (1994) (discussing liable parties under CERCLA).

⁵ See CERCLA § 101(21), 42 U.S.C. 9601(21) (1994) (defining what entities are persons for liability issues under CERCLA).

apply.⁶ In 1998, the Supreme Court settled the split with its decision in *United States v. Bestfoods*.⁷

In *Bestfoods*, the Court held that a parent corporation can be derivatively liable for the actions of its subsidiary only when facts are present which would justify piercing the corporate veil and abrogating the parent's traditional limited liability status because it significantly failed to respect the corporate form.⁸ However, while the Court did appear to heighten the standard for derivative liability, it made it clear that a parent can be liable in another way—it can be directly liable for its own actions in hazardous waste contamination.⁹ Under *Bestfoods*, a parent can be directly liable for its own actions if it is operating a facility, even if the facility is owned by its subsidiary.¹⁰ Thus, this decision directs the lower courts to focus on the parent's actions with respect to the contaminated facility and not just its actions toward the subsidiary.¹¹

Part II of this Comment will give a brief overview of the relevant law on the issue of parent liability under CERCLA prior to the Supreme Court's decision in *Bestfoods*. Part III will discuss the procedural history and the factual setting of the case and Part IV will discuss the Court's holding and analysis in its decision. Part V will consider the impact of *Bestfoods* on CERCLA liability and what the holdings mean for parent corporations, as well as identify a specific omission in the decision which will lead to conflict among the circuits and will require future resolution by the Supreme Court.

II. THE RELEVANT LAW ON PARENT LIABILITY UNDER CERCLA PRIOR TO *BESTFOODS*

In *Bestfoods*, the Supreme Court decided the issue of whether a parent corporation can be liable under CERCLA for the actions of its subsidiary without requiring that the corporate veil be pierced to assign liability.¹² In answering this question, the Court considered a mix of corporate common law and statutory environmental law. Traditionally, corporate parents, like individual shareholders, are afforded the protection of limited liability.¹³ On the other hand, CERCLA was

⁶ See *infra* Part II.C (discussing the split among the circuits concerning parent liability under CERCLA).

⁷ See *United States v. Bestfoods*, 524 U.S. 51 (1998).

⁸ See *id.* at 63–64.

⁹ See *id.* at 65–66.

¹⁰ See *id.* at 67–68.

¹¹ See *id.* at 68.

¹² See *id.*

¹³ See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 139–41 (6th ed. 1996); WILLIAM A. KLEIN & J. MARK RAMSEYER, *CASES AND MATERIALS ON BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS & CORPORATIONS* 215 (3d ed. 1997) [hereinafter *BUSINESS ASSOCIATIONS*].

passed to prevent and clean up hazardous waste contamination.¹⁴ Its goal is to hold parties who are responsible for the contamination liable for the costs of its clean up.¹⁵ The circuits have taken different positions on what effect CERCLA's passage has had on a parent's limited liability in this context.¹⁶ This Part will briefly summarize the relevant law as it existed on the issue of parent liability prior to the Supreme Court's ruling.

A. CERCLA

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was passed as a response mechanism to deal with the increased number of sites being discovered in which hazardous waste contamination was posing a significant threat to public health and environmental welfare.¹⁷ CERCLA was the first federal statute enacted to prevent and remediate such hazardous waste contamination.¹⁸

CERCLA's goal is to hold liable parties who are responsible or who contributed to the contamination and force these parties to reimburse the government or pay for the costs of cleaning up the harmed site.¹⁹ Under

¹⁴ See *infra* note 18.

¹⁵ See JANET S. KOLE & LARRY D. ESPEL, ENVIRONMENTAL LITIGATION 1 (1991).

¹⁶ See *infra* Part II.C and accompanying text.

¹⁷ See CERCLA, 42 U.S.C. §§ 9601-9675 (1994); see also KOLE & ESPEL, *supra* note 15, at 1 (stating that CERCLA was adopted as a direct response to the Love Canal incident which involved buried hazardous waste in a residential area).

¹⁸ See NANCY K. KUBASEK & GARY S. SILVERMAN, ENVIRONMENTAL LAW 193 (2d ed. 1997) (noting that one of CERCLA's goals was to prevent releases of hazardous wastes into the environment, using liability for remediation costs as a disincentive to achieve that goal). In addition, Congress intended that under CERCLA, the government would take an active role in the reclamation of contaminated sites. See *id.* at 207. This was accomplished by establishing a fund (the Superfund) with which to finance clean up projects of contaminated sites. Responsible parties would be sought out by the government and would be forced to either clean up the sites themselves or make payments to the fund if the government cleaned up the site initially. See *id.* at 208. If a responsible party could not be found, then the government fund, and, in the end, the taxpayers, would bear the costs. Therefore, the public would have an incentive to ensure that hazardous wastes were disposed of properly to avoid this situation. See *id.* at 211.

However, while the fund is intended to pay for the clean up of contaminated sites for those areas where a responsible party cannot be located or are in urgent need of clean up, in reality 44% of the money in the fund is spent on litigation expenses for those parties that the government seeks to hold liable for the clean-up costs. See KOLE & ESPEL, *supra* note 15, at 1.

¹⁹ See KOLE & ESPEL, *supra* note 15, at 1; see also E.P.A. Revives Lender Liability Rule, in THE 1997 EXECUTIVE FILE: HOT GOVERNMENTAL ISSUES 9 (M. Lee Smith, ed., 1997) [hereinafter 1997 EXECUTIVE FILE] (noting that the goal of CERCLA is that the "polluter pays" for the costs of cleaning up the contamination). The goal of CERCLA is to require "those responsible for any damage, environmental harm, or injury from chemical poisons [to] bear the costs of their actions." S. REP. NO. 96-848, at 13 (1980). This goal has been supported by the

CERCLA section 107(a),²⁰ a potentially responsible party²¹ can be any person²²

courts. *See generally* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) (noting that courts should give a liberal interpretation to CERCLA to ensure that its congressional purpose is accomplished); United States v. A&N Cleaners & Launderers, 788 F. Supp. 1317, 1331 (S.D.N.Y. 1992) (explaining that "courts generally resolve ambiguities in CERCLA's language in favor of imposing the most expansive liability, citing the statute's remedial purpose").

²⁰ CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994) reads as follows:

a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel or a facility
- (2) any person who at the time of a disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the occurrence of response costs, of hazardous substance, shall be liable for—
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
 - (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
 - (D) the costs of any health assessment or health effects study carried out under § 9604(i) of this title.

²¹ *See generally* 2 JOHN HENRY DAVIDSON & ORLANDO E. DELOGU, FEDERAL ENVIRONMENTAL REGULATION § 6.10 (1989) (noting that the term applies to those persons who may be liable for clean-up expenses under CERCLA); KOLE & ESPEL, *supra* note 15, at 1–2 (using the term to describe any one of the four categories of liable parties under section 107(a)); ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 94 (1991) (same).

²² CERCLA § 101(21), 42 U.S.C. 9601(21) (1994) defines persons under CERCLA to include: "[A]n individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body." (emphasis added); *see also* LIGHT, *supra* note 21, at 94 (stating that in the definition of person under CERCLA, there is no express inclusion of corporate officers and directors, yet courts have routinely found such individuals personally liable for their actions in a corporation's polluting policies).

who is a current owner or operator²³ of a contaminated facility,²⁴ any person who was the owner or operator of the facility at the time the disposal took place,²⁵ any person who was or is a generator of hazardous waste materials,²⁶ or any person who was or is a transporter²⁷ of hazardous waste material to the site at which the contamination is present or where a release has occurred.²⁸ *Bestfoods* deals specifically with a parent's liability as an operator or owner of a facility under section 107(a).²⁹

There are other aspects of CERCLA that should be noted in this discussion. For example, CERCLA liability is also strict liability.³⁰ Therefore, if a party can be classified as one of the four potentially liable parties listed in CERCLA section 107(a) when a release has taken place, that party will be liable for the clean-up costs.³¹ In addition, CERCLA liability is joint and several; thus, if there

²³ See KOLE & ESPEL, *supra* note 15, at 7 (indicating that current owners and operators of facilities can be liable under CERCLA).

²⁴ CERCLA § 101(9), 42 U.S.C. § 9601(9) (1994) defines a facility as:

(A) any building or structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

See also LIGHT, *supra* note 21, at 74–75 (noting that the definition of “facility” is specifically broad so that as long as hazardous waste is present, the area or thing will fall under the definition).

²⁵ See LIGHT, *supra* note 21, at 94–95 (stating that the goal of CERCLA is to hold liable those who are responsible for the contamination or those who did contribute to the contamination even if they are no longer associated with the facility at issue); KOLE & ESPEL, *supra* note 15, at 7 (same).

²⁶ See KOLE & ESPEL, *supra* note 15, at 1 (describing the four categories of potentially responsible parties to include generators). While generators might be liable under the statute, generator liability is not directly at issue in *Bestfoods*, even if the principle holdings of the case could apply in this context.

²⁷ See *id.*; LIGHT, *supra* note 21, at 121–22 (noting that a potentially liable party can be an individual who transports hazardous waste to the facility for disposal).

²⁸ See CERCLA § 101(22), 42 U.S.C. § 9601(22) (1994) (giving the definition of a hazardous waste release under CERCLA).

²⁹ See *United States v. Bestfoods*, 524 U.S. 51, 51 (1998) (Syllabus).

³⁰ See KUBASEK & SILVERMAN, *supra* note 18, at 210; LIGHT, *supra* note 21, at 122 (citing *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), which holds that liability under CERCLA is strict or absolute liability).

³¹ Liability under CERCLA is strict liability or liability which is imposed without regard to actual fault. See 1997 EXECUTIVE FILE, *supra* note 19, at 9 (noting that this is why a current owner who has not necessarily contributed to the contamination of a site, but has not taken steps to stop the spread of the pollution can be liable under CERCLA). Under CERCLA, so long as

are numerous parties who are liable for the contamination, any one of these parties can be required to pay the entire amount of the clean-up judgment (ensuring that the government gets paid back or that the clean up is undertaken even if some of the contributors are insolvent).³² Finally, there are very few exceptions to liability under CERCLA once the determination is made that a party is one of the types listed in section 107(a).³³

B. Traditional Concepts of Corporate Common Law

Corporations are a fairly recent development that enable large amounts of capital to be pooled together to accomplish more expansive goals.³⁴ Partial ownership is a key incentive to investment in a corporation.³⁵ Traditionally, these investors have been protected from liability for the actions and debts of the corporation by the concept of limited liability.³⁶ A corporation, as a legal entity,³⁷

an individual can be classified as a potentially responsible party, that individual can be legally responsible regardless of whether or not he was a significant contributor in the contamination activities. See KUBASEK & SILVERMAN, *supra* note 18, at 210 (noting that under CERCLA, individuals can be liable even if they were in compliance with the laws in existence at the time the release or disposal occurred); LIGHT, *supra* note 21, at 122. Light discusses the application of strict liability for CERCLA violations, noting that when enacting the statute, Congress discussed the notion that CERCLA liability should be of the same nature as liability under the Clean Water Act. At the time of CERCLA's passage, the Clean Water Act had already been interpreted by courts to impose strict liability on violators. See *id.* (citing 126 CONG. REC. H11788 (daily ed. Dec. 3, 1980) for illustration). In addition, according to *Monsanto Co.*, 858 F.2d at 167, courts have routinely applied strict liability under CERCLA since its passage.

³² Liability under CERCLA is joint and several liability and can be applied retroactively. See *B. F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (noting that CERCLA liability is joint and several); *O'Neil v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989) (same); DAVIDSON & DELOGU, *supra* note 21, § 6.07 (noting that under CERCLA "every party who is liable in any way or to any degree is potentially liable for the entire cost of clean-up" and it is their responsibility to seek indemnification from any other liable parties); 1997 EXECUTIVE FILE, *supra* note 19, at 9.

³³ There are few exceptions to liability under CERCLA. See CERCLA § 107(b), 42 U.S.C. § 9607(b) (1994) (listing the exceptions to liability under CERCLA, which include "acts of God" and "acts of war"). There is also an innocent purchaser defense that can be raised by a purchaser of contaminated property who acquires contaminated property without knowledge of the contamination. See KOLE & ESPEL, *supra* note 15, at 12 (discussing the exceptions to liability under CERCLA). Another recognized exception is the secured creditor exemption which exempts from liability any owner who acquired property involuntarily or by foreclosure, who is only involved with a facility to protect a security interest, and who does not actively participate in the management of the facility. See 1997 EXECUTIVE FILE, *supra* note 19, at 9.

³⁴ See generally KLEIN & COFFEE, *supra* note 13, at 114-18.

³⁵ See *id.* at 105.

³⁶ See *id.* at 106; THOMAS HEIDEN, RESPONSIBILITY OF THE CORPORATE PARENT FOR ACTIVITIES OF A SUBSIDIARY 67-68 (1986) (noting that one goal of limited liability is to promote investment which in turn stimulates economic growth).

can take advantage of this limited liability when owning a subsidiary corporation—the corporation who owns the shares of the other is called the parent corporation.³⁸ Thus, a parent corporation, like a traditional shareholder, will usually not be liable for the actions or debts of its subsidiary, because it is protected by limited liability.³⁹

The traditional rule is that parent corporations, like shareholders, are not liable for the debts and actions of their subsidiaries.⁴⁰ This concept is known as limited liability, because shareholders or parents are only liable for the corporation's debts up to the amount of their investment.⁴¹ Therefore, creditors and judgment holders cannot seek additional assets from shareholders or from the parent corporations to satisfy the debts or judgments of the owned corporation or subsidiary.⁴²

There are few exceptions to this rule of law.⁴³ One main exception arguably applicable to parent liability under CERCLA exists at common law,⁴⁴ and a second exception which might also apply is suggested by the Court in the dictum of *Bestfoods*.

The first exception is when the corporate form—or the protection of limited liability—is disregarded because the parent and the subsidiary are in reality one entity. This “unity of interest”⁴⁵ justifies piercing the corporate veil of limited

³⁷ See KLEIN & COFFEE, *supra* note 13, at 108–09 (discussing the notion that a corporation is sometimes deemed a “fictional” entity because it takes on the legal characteristics of a “human being” even though it obviously is not).

³⁸ See BUSINESS ASSOCIATIONS, *supra* note 13, at 215.

³⁹ See LIGHT, *supra* note 21, at 101–02 (stating that ownership of a corporation is generally insufficient by itself to produce liability for a parent or a shareholder for the actions of a subsidiary or a corporation).

⁴⁰ See KLEIN & COFFEE, *supra* note 13, at 139–41 (finding that under corporate common law shareholders are not liable for debts incurred in the operation of a corporation).

⁴¹ See *id.*

⁴² See *id.*

⁴³ See generally *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting *Anderson v. Abbott*, 321 U.S. 349, 362 (1944), which found that “[l]imited liability is the rule, not the exception”). However, exceptions do exist to this basic principle. See HEIDEN, *supra* note 36, at 87 (stating that exceptions to limited liability occur when the courts balance the benefits of limited liability against its costs and the costs are greater). For example, one exception is called “piercing the corporate veil.” This will occur most often in situations where the corporation is closely held, or is almost solely owned by one party. Courts allow limited liability to be abrogated in this case because there is little or no separation between the management of the corporation and those who bear the risk of investment in the corporation. Courts realize that in situations like these the interests of the parties coincide or there is a unity of interests. See *id.* at 87–88.

⁴⁴ See KLEIN & COFFEE, *supra* note 13, at 139–41 (discussing the exceptions to limited liability and specifically addressing the exception of piercing the corporate veil, which developed at common law).

⁴⁵ See generally *Sea-Land Serv., Inc. v. Pepper Source*, 941 F.2d 519, 520 (7th Cir. 1991)

liability to reach the assets of the shareholder-parent, so that the subsidiary's debts and judgments can be satisfied.⁴⁶ The second exception, as implied by the Court in *Bestfoods*, is that if Congress wished to abrogate the common law principle of limited liability, it could accomplish this by expressly stating in the statute that the principle does not apply under CERCLA.⁴⁷ Thus, parents would not have limited liability protection for CERCLA violations of their subsidiaries.

However, despite the lack of express language to that effect in CERCLA, certain courts have interpreted the statute to imply that a parent can be liable for the actions of a subsidiary without having to go through the traditional exception of piercing the corporate veil.⁴⁸ Yet, some circuits have not followed this lead.⁴⁹

1. *Veil-Piercing*

Piercing the corporate veil has been called a "murky"⁵⁰ concept and one of the "most confusing [areas] of corporate law,"⁵¹ because given identical fact patterns, courts have reached very conflicting results. In other words, when faced with the exact same situation, some courts will pierce the corporate veil and others will not.⁵²

One reason for the confusion is that there exists no universal standard to

(stating that one requirement to pierce the corporate veil is that there be a "unity of interest" between the owner and the corporation such that they are in essence one entity); *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991) (same).

⁴⁶ See KLEIN & COFFEE, *supra* note 13, at 140; see also *infra* Part II.B.1.a.i.

⁴⁷ See *Bestfoods*, 524 U.S. at 62 (finding that CERCLA did not expressly pre-empt the common concept of limited liability, and thus the principle still applied); see also *United States v. Cordova Chem. Co.*, 113 F.3d 572, 579 (6th Cir. 1997) (same); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990) (same).

⁴⁸ See *infra* Part II.C (discussing the different interpretations of CERCLA espoused by various courts); see also LIGHT, *supra* note 21, at 98-99 (noting that CERCLA's silence on the issue of parent liability has been treated as permission to ignore the corporate form, a move which courts have justified by looking to CERCLA's goal of making those responsible for contamination pay for its clean up).

⁴⁹ See *infra* Part II.C.3.

⁵⁰ KLEIN & COFFEE, *supra* note 13, at 140.

⁵¹ HEIDEN, *supra* note 36, at 13 (citing Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985)).

⁵² See *id.* (noting that parties have a difficult time predicting the outcome in a veil-piercing situation because "piercing seems to happen freakishly"). Compare HEIDEN, *supra* note 36, at 87-89 (suggesting that courts are more willing to pierce the corporate veil in specific situations depending on the circumstances and actors involved and may be more likely to pierce the veil to reach the assets of a corporate owner than those of an individual shareholder); KOLE & ESPEL, *supra* note 15, at 8 (suggesting that courts are more likely to hold a parent corporation liable when the parent has benefited from the actions of the subsidiary) with KLEIN & COFFEE, *supra* note 13, at 141 (noting that courts are not more likely to pierce the corporate veil when the owner is a corporation and not an individual shareholder).

determine when a parent corporation should be held liable for the actions of its subsidiary.⁵³ Individual states may and do have different standards.⁵⁴ The most common standard requires that the parent and the subsidiary share a "unity of interest"⁵⁵ or that the subsidiary functions as the "alter ego"⁵⁶ of the parent corporation. Some states apply this standard, but also require an additional finding

⁵³ See *infra* note 54 (discussing several different state standards).

⁵⁴ Corporations are the creations of state law. States have developed individualized common law to govern corporations within their borders. Veil-piercing standards are no exception. Most states require that there be a showing that the two entities were in reality acting as one, which is also known as the "alter-ego" element. However, some states also require a showing of fraud or a showing that the parent was using the subsidiary illegally to avoid liability. See *United States v. Cordova Chemical Co.*, 113 F.3d 572, 580 (6th Cir. 1997) (listing the elements for veil piercing in Michigan to include fraud as an element); *Sea-Land Serv., Inc. v. Pepper Source*, 941 F.2d 519, 520-21 (7th Cir. 1991) (requiring, under Illinois law, a showing of fraud); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) (noting that fraud is an element in the Fifth Circuit). But see *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991) (discussing the West Virginia test for veil piercing as having two requirements: (1) unity of interest and (2) whether the result would be inequitable if the corporate form was respected); see also *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 866 (S.D. Ohio 1998), which describes the elements for veil piercing in Ohio. *Union Tank* describes a three part test: (1) that the "corporation has no separate mind, will, or existence, of its own," (2) control by the parent "was in such a manner as to commit fraud or an illegal act," and (3) "injury and unjust loss resulted to the plaintiff." *Id.* at 866. Yet, when analyzing how Ohio courts have treated the "fraud" element in the test, *Union Tank* noted that the Supreme Court of Ohio in *Belevedere Condominium Unit Owner's Ass'n. v. R.E. Roark Cos.*, 617 N.E. 2d 1075 (Ohio 1993) stated that "the requirement that a corporation be formed in order to perpetuate a fraud is simply too strict." *Id.* at 1085 (emphasis in original). Therefore, according to *Union Tank*, Ohio courts allow veil piercing when "inequitable or unfair consequences have resulted" instead of fraud. *Union Tank*, 29 F. Supp. 2d at 868 (citing a list of Ohio decisions which agree with this proposition). Thus, the Ohio standard appears to be more lenient than the standards for Michigan or Louisiana; see also KOLE & ESPEL, *supra* note 15, at 8 (finding that some standards will allow the corporate veil to be pierced if the subsidiary's corporate identity is a sham).

⁵⁵ See *Union Tank*, 29 F. Supp. 2d at 866 (describing the Ohio standard as when the subsidiary has "no separate mind, will, or existence of its own"); see also KLEIN & COFFEE, *supra* note 13, at 140 (detailing the "disregard [of] the separate character of the corporate entity").

⁵⁶ See KOLE & ESPEL, *supra* note 15, at 8. Kole and Espel explain:

Under normal corporate law principles, parent corporations are generally insulated from the debts and liabilities of their subsidiaries, just as individual stockholders are insulated from corporate debts and liabilities. A parent corporation, however, can be found to be derivatively liable for its subsidiary's debts if a court determines that a subsidiary functions merely as an alter ego of a parent.

Id.

that the parent used the subsidiary to perpetuate fraud or to avoid personal liabilities by illegal means in order for the veil to be pierced.⁵⁷

a. *Alter-Ego Considerations*

When considering whether a subsidiary is an "alter-ego" of a parent corporation, courts will consider a multitude of factors. Probably one of the most important criteria is whether or not a subsidiary is wholly owned by the parent corporation.⁵⁸ Although this is not itself sufficient to justify piercing the corporate veil, there has yet to be a case which has permitted the corporate veil to be pierced in order to hold a shareholder-parent of a public corporation personally liable when there are thousands of other legal entities who own stock in the subsidiary.⁵⁹

A court will also closely consider the financial arrangement between the two corporations, whether corporate formalities are respected, whether the corporations have officers and directors in common, and whether and to what extent the parent is involved with the day-to-day operations of the subsidiary's management.⁶⁰ Another important consideration for the court is whether the

⁵⁷ See *Joslyn Mfg. Co.*, 893 F.2d at 83 (finding that Louisiana law requires that "[v]eil piercing should be limited to situations in which the corporate entity is used as a sham to perpetuate a fraud or avoid personal liability"); *Cordova Chemical Co.*, 113 F.3d at 580 (6th Cir. 1997) (applying unity of interest test but also requiring that the subsidiary be used to perpetuate fraud, which was not present in that case); see also KLEIN & COFFEE, *supra* note 13, at 140.

⁵⁸ See HEIDEN, *supra* note 36, at 16; LIGHT, *supra* note 21, at 98-99 (noting that closely held corporations (which include parent-subsidiary relationships) generally "debunk" the policies which support a concept of limited liability because in many cases the interests of the corporations coincide with the interests of the owners or they are no longer separate entities in reality). But see *In re Acushnet River*, 675 F. Supp. 22, 32 (D. Mass. 1987) (stating that to find a parent liable under CERCLA more than just ownership of the subsidiary must be shown).

⁵⁹ See KLEIN & COFFEE, *supra* note 13, at 141; HEIDEN, *supra* note 36, at 87-88 (finding that in most cases where veil piercing has been permitted by a court, the corporation has been closely held or the stock was owned by a very small number of individuals or entities such as a parent corporation).

⁶⁰ See HEIDEN, *supra* note 36, at 16-20. Heiden articulates a large number of considerations courts will take into account when determining if the subsidiary is an alter-ego of the parent. Courts will consider: (1) whether the parent has full ownership of all of the subsidiary's stock; (2) whether the subsidiary is financed by the parent; (3) whether the amount of influence the parent has over the financial affairs of the subsidiary is extensive; (4) whether the corporations share officers and directors; (5) whether the subsidiary holds its own shareholder and director's meetings and maintains its own corporate formalities (like an elected board of directors); (6) whether the business contracts between the two corporations tend to favor the parent; (7) whether they keep separate accounts and books or commingle funds; (8) whether officers of the parent determine the policies of the subsidiary; (9) the extent to which the officers and directors of the parent are connected to the tort or contract on which the suit is based; (10) the type of business each corporation is involved in and whether the subsidiary only

subsidiary is adequately capitalized for the type of business operation that it undertakes.⁶¹ Depending on the jurisdiction, a court may, after considering these factors, find that the subsidiary corporation is in fact an alter-ego for the parent, or that the interests of the two entities coincide so much that they cannot legally be distinguished from one another. In this situation, a court will allow the corporate veil to be pierced and the parent's assets will not be protected by limited liability.⁶²

b. Fraud or the Avoidance of Personal Liability

Some jurisdictions have held that the parent corporation maintains its limited liability even when the subsidiary is found to be an alter-ego of the parent (upon consideration of the aforementioned factors).⁶³ These jurisdictions require that a subsidiary be used by a parent to perpetuate fraud or avoid personal liabilities, which traditionally means that the subsidiary was formed or used to fraudulently avoid payment of the debts by the parent.⁶⁴ However, not all courts require such a

does business with the parent or has other clients as well; (11) extent to which the business world treats the two corporations as one unit; (12) the ability of the parent to control the activities of the subsidiary; (13) extent to which the parent is involved in the day-to-day operations of the subsidiary; and (14) whether the subsidiary is undercapitalized for the type of business it conducts. *See id.*; *see also* LIGHT, *supra* note 21, at 105 (suggesting some additional criteria that courts consider in determining if a subsidiary is an alter-ego of the parent: (1) if they have common business departments; (2) if the two corporations have consolidated financials and tax returns; (3) if the parent caused the subsidiary to be incorporated; (4) if the parent pays the expenses of the subsidiary; (5) if the subsidiary only does business with the parent; (6) if the parent uses the subsidiary's property as if it were its own; and (7) if the daily operations of the two are kept separate).

⁶¹ *See* HEIDEN, *supra* note 36, at 91 (noting that a parent can use a subsidiary to undertake risky activities and still avoid liability for itself, and therefore there is little "incentive" for a parent to keep the subsidiary adequately capitalized in such a situation, since the capital is lost if the subsidiary is found liable for some action). *Compare* KLEIN & COFFEE, *supra* note 13, at 140 (stating that undercapitalization of a subsidiary is an important consideration under a veil-piercing standard, but that it, like mere ownership, is not sufficient in and of itself to justify piercing the corporate veil) *with* LIGHT, *supra* note 21, at 103 (suggesting that some courts have determined that to do justice to the goals of CERCLA, parents should be liable if a subsidiary lacks the resources to pay for its environmental harms). *See generally* HEIDEN, *supra* note 36, at 21 (noting that another consideration of courts is the undercapitalization of the subsidiary considering the business in which it is involved) (citing *Joslyn Mfg. Co.*, 893 F.2d at 80).

⁶² *See* KOLE & ESPEL, *supra* note 15, at 8 (finding that the corporate form can be disregarded in the interest of "convenience, fairness and equity").

⁶³ *See generally* *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir. 1997) (applying the Michigan veil-piercing standard where a showing of fraud or injustice is required to permit limited liability to be abrogated); *Sea-Land Serv., Inc. v. Pepper Source*, 941 F.2d 519, 520–21 (7th Cir. 1991) (requiring a showing of fraud to permit the corporate veil to be pierced under Illinois law).

⁶⁴ *See Cordova Chem. Co.*, 113 F.3d at 580; *Sea-Land Serv.*, 941 F.2d. at 520–21; *Joslyn*

strict standard—some jurisdictions require only that the parent-subsidary relationship be used to promote injustice or an inequity.⁶⁵ Promotion of injustice requires a lesser showing on the part of the plaintiff or government to achieve veil piercing than a showing of fraud requires.⁶⁶

2. Other Theories of Liability

The Court of Appeals for the Sixth Circuit stated that a parent corporation might be directly liable under a theory of joint venture or partnership with the subsidiary.⁶⁷ Therefore, if the parent and the subsidiary operate a facility in conjunction with one another, the parent can be directly liable.⁶⁸ A parent can also be liable as a principle if the subsidiary acts as an agent of the parent when operating the facility.⁶⁹ Other theories under which a parent could be liable for the actions of its subsidiary might be apparent authority,⁷⁰ participation or acquiescence in the subsidiary's fraud, a parent's own fraudulent conduct, a parent's own misrepresentations concerning the actions of its subsidiary, or the negligent failure of the parent to control its subsidiary.⁷¹

C. Previous Treatment of Parent Liability Under CERCLA § 107(a)

Parent liability has been debated by the courts since the passage of CERCLA

Mfg. Co., 893 F.2d at 83.

⁶⁵ See *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991) (discussing the West Virginia test for veil piercing as having two elements: (1) unity of interest and (2) whether the result would be inequitable if the veil was not pierced).

⁶⁶ See *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 867–68 (S.D. Ohio 1998) (stating that the Ohio standard requires a lesser showing than fraud, because the Ohio standard will allow veil piercing when an inequity or unfairness will result); see also *infra* Part V.C (discussing whether federal or state common law should be applied under CERCLA).

⁶⁷ See *Cordova Chem. Co.*, 113 F.3d at 580.

⁶⁸ See generally NICHOLAS P. CHEREMISINOFF & MADELYN L. GRAFFIA, ENVIRONMENTAL AND HEALTH & SAFETY MANAGEMENT: A GUIDE TO COMPLIANCE 26–27 (1995) (stating that one theory of liability is “concert” liability where the parent and the subsidiary take actions in concert with one another for a common goal, a concept similar to joint venture liability).

⁶⁹ See HEIDEN, *supra* note 36, at 222 (suggesting that a principle-agent relationship can be established by mutual consent between the parent and the subsidiary, by express consent of the subsidiary, by complete domination of the subsidiary by the parent, or the complete stock ownership of the subsidiary by the parent).

⁷⁰ See *id.* at 21 (stating that a subsidiary acts with apparent authority when its actions with respect to a third party suggest that it is acting on behalf of the parent).

⁷¹ See *id.* at 29 (suggesting the above laundry list of other possible ways to find a parent liable for the actions of its subsidiary).

in 1980.⁷² The Supreme Court chose to settle the issue in *Bestfoods*.⁷³ However, prior to this decision, there were three different interpretations that developed and were applied in the federal courts.⁷⁴

1. The "Actual Control" Test

Under this theory, courts reasoned that CERCLA's goal of making responsible parties liable for clean-up costs dictated an abrogation of limited liability for parent corporations if they "actually controlled" their subsidiary's management and day-to-day operations.⁷⁵ In fact, even though CERCLA did not expressly address the issue, CERCLA's omission was treated by the courts as a license to ignore the corporate form to support the underlying purposes of CERCLA.⁷⁶ Courts argued that if a parent had actual control over a subsidiary's day-to-day operations then they, the parent, must also have control over the

⁷² See LIGHT, *supra* note 21, at 94-98.

⁷³ See *United States v. Bestfoods*, 524 U.S. 51 (1998) (finding that liability under CERCLA could be accomplished either by piercing the corporate veil or by a finding that the parent was in actual control of the pollution facility, regardless of the parent's control of the subsidiary).

⁷⁴ See *infra* Part II.C.1-3. See also LIGHT, *supra* note 21, at 110-12 (noting that courts are divided on the effect of CERCLA on the corporate form in the context of a parent-subsidiary relationship). But see *United States v. A&N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1331 (S.D.N.Y. 1992) ("[C]ourts generally resolve ambiguities in CERCLA's language in favor of imposing the most expansive liability, citing the statute's remedial purpose").

⁷⁵ See *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 22 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990) (holding that a parent can be liable for the subsidiary's liability under CERCLA without having to pierce the corporate veil if the parent has actual control over the subsidiary). In *Kayser-Roth*, the court articulated factors which if present might produce a showing of actual control by a parent. They include: if the parent controls the financial affairs of the subsidiary, the employees of the subsidiary and their work assignments, the disposal of hazardous wastes of the subsidiary, and if the parent is the sole owner of the subsidiary. See *id.* at 22-23; see also *FMC Corp. v. United States Dep't. of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994); *Landsford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993). See generally James P. Demario & Donna Drewes, *Does Corporate Superfund Liability Extend to Parent Companies?*, in THE 1995 EXECUTIVE FILE: HOT ENVIRONMENTAL ISSUES 14 (M. Lee Smith ed., 1995) [hereinafter 1995 EXECUTIVE FILE] (stating that the actual control test when applied considers the "pervasive control" of a subsidiary by a parent); LIGHT, *supra* note 21, at 94 (stating that the general test for liability under CERCLA looks at the level of control the individual has over the pollution and that control of a company operating a facility can be enough to find a parent liable).

⁷⁶ See generally *Kayser-Roth Corp.*, 724 F. Supp. at 22; *FMC Corp.*, 29 F.3d at 843 ("The actual control test imposes liability which would not be consistent with 'traditional rules of limited liability' but nevertheless is consistent 'with CERCLA's broad remedial purposes'"); *Landsford-Coaldale Joint Water Auth.*, 4 F.3d at 1221.

subsidiary's pollution policies and could have prevented in some way the ensuing environmental harm.⁷⁷ Generally, this test was very fact driven.⁷⁸

If a parent corporation was found to be in actual control of its subsidiary, then the parent could be liable for the actions of its subsidiary without having to meet the traditional veil-piercing standard.⁷⁹ To make such a finding of actual control, courts would consider whether the subsidiary was wholly owned, if the corporations shared officers, and if the parent controlled the subsidiary's policies, procedures, and business management.⁸⁰ A parent, under this approach, did not have to control the polluting facility of the subsidiary.⁸¹ It was enough that the parent had "actual control" over the subsidiary.⁸²

2. The "Capacity or Authority to Control" Test

The "capacity or authority to control" test was broader than the "actual control" test.⁸³ Under this interpretation, a parent corporation was liable as an

⁷⁷ See *Kayser-Roth Corp.*, 724 F. Supp. at 22.

⁷⁸ See *id.* *Kayser-Roth* listed the factors which proved actual control of a subsidiary by the parent in that case: (1) financial control of the subsidiary, (2) restriction of the subsidiary's budget and spending, (3) environmental affairs on behalf of the subsidiary are determined by the parent, (4) real estate transactions required parental approval, (5) dual officers were used to control subsidiary's policies and (6) approval of capital transfers of expenditures.

⁷⁹ See *id.* at 23 (finding that the corporate form can be "disregarded in the interest of public convenience, fairness and equity" when a parent actually controls the management and business affairs of its subsidiary). This court determined that under CERCLA, the corporate structure receives no "special importance." *Id.* at 24; see also *FMC Corp.*, 29 F.3d at 843; *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221; *LIGHT*, *supra* note 21, at 95-96 (finding that a parent's control of a subsidiary which operates a facility for the purposes of CERCLA is enough to trigger liability under CERCLA).

⁸⁰ See *Kayser-Roth Corp.*, 724 F. Supp. at 22-23.

⁸¹ See *LIGHT*, *supra* note 21, at 96 (noting that under the actual control test, a parent's liability is based on its "pervasive control" of the subsidiary regardless of the fact that the parent might not have actually controlled the waste disposal activities of the subsidiary). But see *Colorado v. Idarado Mining Co.*, 18 Env'tl. L. Rep. 20578, 20578-79 (D. Colo. 1987) (adopting a version of the actual control test which it patterned after the test for liability under the Clean Water Act section 311 which focused on the parent's control of the subsidiary's facility, not the control of the subsidiary).

⁸² Mark E. McKane, Comment, *Operator Liability for Parent Corporations Under CERCLA: A Return to Basics*, 91 NW. U. L. REV. 1642, 1663 (1997) (stating that actual control of the subsidiary is the minimum required to meet the actual control test).

⁸³ See *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 672 (D. Idaho 1986) (articulating the "capacity to control" test as determining that a parent will be liable when the parent had the "capacity to prevent and abate damage"). *Bunker Hill* also stresses that if a parent could only be liable as an operator under a veil-piercing standard, that would "allow the corporate veil to frustrate congressional purpose." *Id.*; see also *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1086 (8th Cir. 1995) (stating that for a parent to be liable it has to have the authority to control the actions of the subsidiary, but noting that even though it was considering arranger

operator under CERCLA if the parent had the "capacity to control" the activities of its subsidiary.⁸⁴ Courts, using this test, were able to hold a parent liable for the actions of a subsidiary so long as the parent could have made decisions for the subsidiary or forced the subsidiary to take certain action desired by the parent.⁸⁵ However, there was no requirement that the parent actually exert any control over the subsidiary—it was enough that the parent could have exerted such authority under this test.⁸⁶ Opponents claimed that under this reasoning any parent who was the sole owner of a subsidiary could be liable even if the subsidiary was merely held as an investment, because as a sole owner, it would have the power to control the actions of the subsidiary.⁸⁷

While this approach sought to uphold CERCLA's goal of forcing those responsible for contamination to pay for its clean up,⁸⁸ this approach seemed to fly fully in the face of traditional common law concepts of limited liability for owners of corporations,⁸⁹ because parents could be liable for merely owning a subsidiary, and not for any actions directly taken by the parent with regard to the contamination.⁹⁰

liability under CERCLA, the test applies to operator liability, as well); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836–37 (4th Cir. 1992); *LIGHT*, *supra* note 21, at 104 (stating that *Bunker Hill* represented a divergence from the traditional notions of corporate separateness and limited liability).

⁸⁴ See 1995 EXECUTIVE FILE, *supra* note 75, at 15 (comparing the capacity to control with the actual control test and distinguishing the capacity to control test in that the parent has the "power to direct activities" of a subsidiary); *LIGHT*, *supra* note 21, at 97–98 (noting that under the capacity to control test, mere ownership of a subsidiary could result in liability for the parent). *Light* argues that under this test the question of whether a parent is liable as an operator considers whether they "could affect" the disposal decisions of a subsidiary. *Id.* at 97.

⁸⁵ See *Bunker Hill Co.*, 635 F. Supp. at 672. The court in *Bunker* looked to see if the parent had the capacity to control the hazardous waste disposal, if the parent could control the "activities of persons who control[led]" the pollution facility, and whether the parent could force the prevention of such pollution. *Id.*

⁸⁶ See *id.* (finding the parent liable if they had the capacity to control the prevention of the pollution, but failed to stop its release); see also *LIGHT*, *supra* note 21, at 97 (noting that this test considers a parent's authority to control the disposal practices of the subsidiary, whether the parent gave such authority to the subsidiary, and whether the parent had knowledge of the subsidiary's disposal practices).

⁸⁷ See *LIGHT*, *supra* note 21, at 97–98 (noting that under the capacity to control test it would be possible for a parent to be liable for mere ownership of a subsidiary).

⁸⁸ See *supra* Part II.A and accompanying text. But see *LIGHT*, *supra* note 21, at 110–11 (opining that Congress intended CERCLA to balance the interests of state corporate law and the federal policy of environmental clean up and that CERCLA was not intended to achieve the goal of clean up at any cost).

⁸⁹ See *supra* Part II.B.1 (discussing traditional limited liability).

⁹⁰ See 1995 EXECUTIVE FILE, *supra* note 75, at 15 (stating that limited liability can be disregarded "in the interest of public convenience, fairness, and equity"). Thus, if limited

3. "Piercing the Corporate Veil" Test

Some courts were unconvinced by the policies that supported the other two approaches to parent liability under CERCLA.⁹¹ These courts determined that CERCLA was passed with the knowledge that owners of corporations enjoyed the benefit of limited liability.⁹² CERCLA does not include parent corporations in its definition of potentially responsible persons.⁹³ Therefore, these courts reasoned that without express congressional override, limited liability still existed and any exception to limited liability required that the party bringing suit be able to pierce the corporate veil to find the parent liable.⁹⁴

These courts found that a parent was only liable under CERCLA when the

liability can be disregarded for such reasons, then a parent could be liable for merely owning a subsidiary if it will violate public fairness and equity. *But see In re Acushnet River*, 675 F. Supp. 22, 32 (D. Mass. 1987) (noting that more evidence than just a parent's ownership of the subsidiary needed to be present to find a parent liable under CERCLA); *LIGHT*, *supra* note 21, at 101 (noting that ownership alone would be insufficient in most cases to produce liability).

⁹¹ See *United States v. Cordova Chem. Co.*, 113 F.3d 584, 590-91 (6th Cir. 1997); *Joslyn Mfg. Co. v. T.L. James*, 893 F.2d 80, 83-84 (5th Cir. 1990) (holding that a parent could only be liable for actions of its subsidiary if the corporate veil standard was met). Some sources even hypothesized before the decision in *Bestfoods* that the trend among the circuits was to move more toward respecting the corporate form and traditional theories of limited liability unless the corporate veil could be pierced. See 1995 EXECUTIVE FILE, *supra* note 75, at 16; *KOLE & ESPEL*, *supra* note 15, at 9 (noting that *Joslyn* represented a "retreat" from the expansive trend of allowing a parent to be liable without having to meet the traditional standard for veil piercing). However, these decisions were still among the minority position before *Bestfoods*. See generally *Karnie Frischknecht Brown, Note, Parent Corporation Liability for Subsidiary Violations Under § 107 of CERCLA: Responding to United States v. Cordova Chemical Co.*, 1998 BYU L. REV. 265, 271 (1998).

⁹² See *Joslyn Mfg. Co.*, 893 F.2d at 82-83; *In re Acushnet*, 675 F. Supp. at 32 (this decision respected traditional notions of corporate common law and required that the veil-piercing standard be met to find a parent liable); *United States v. USX Corp.*, 68 F.3d 811, 822 (3d Cir. 1995) (finding parent liability without piercing the corporate veil to be contrary to the traditional corporate law concept, even though the court in this case did find the defendant liable without piercing the veil).

⁹³ See CERCLA § 101(21), 42 U.S.C. § 9601(21) (1994) (defining "person" under CERCLA); see also *KOLE & ESPEL*, *supra* note 15, at 9 (noting that the parent corporation is not included in the definition of persons under CERCLA). *But see LIGHT*, *supra* note 21, at 94-95 (noting that even though corporate officers were not expressly included in the definition of persons under CERCLA, courts have not been reluctant to find them personally liable for actions taken by the corporation).

⁹⁴ See *Cordova Chem. Co.*, 59 F.3d at 590-91; *Joslyn Mfg. Co.*, 893 F.2d at 82-83 (noting that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept [in other words, the common law], it makes that intent specific") (citations omitted); see also *KOLE & ESPEL*, *supra* note 15, at 9 (same). *But see LIGHT*, *supra* note 21, at 94-95 (noting that even though corporate officers were not expressly included in the definition of persons under CERCLA, courts routinely found them personally liable for their actions in corporate pollution).

corporate veil could be pierced.⁹⁵ Therefore, under this theory, a parent could not be directly liable as an operator for the actions of its subsidiary regardless of its control over the subsidiary's actions or its control over the facility unless there was a showing that the veil-piercing standard had been satisfied.⁹⁶

III. *UNITED STATES V. BESTFOODS*: FACTS AND PROCEDURAL HISTORY

In order to fully understand the impact of *United States v. Bestfoods*,⁹⁷ it is necessary to look briefly at the facts and procedural history of this complex case because they will provide the context in which the Supreme Court ultimately and unanimously resolved the issue of a parent corporation's liability under CERCLA.⁹⁸ The Court's final determination on the liability of a parent under CERCLA disagreed with the district court's analysis⁹⁹ and distinguished the Sixth Circuit's treatment of the issue.¹⁰⁰ Both of the lower court decisions represented interpretations that were present in the circuits prior to the *Bestfoods* decision.¹⁰¹

⁹⁵ See *Joslyn Mfg. Co.*, 893 F.2d at 83. But see *Schiavone v. Pearce*, 79 F.3d 248, 253–54 (2d Cir. 1996) (holding that owner liability could only be attached to a parent if the veil is pierced, but noting that a parent can be liable as an operator for its own actions in operating a facility).

⁹⁶ See 1995 EXECUTIVE FILE, *supra* note 75, at 16 (stating that the veil-piercing standard for disregarding the corporate form requires a showing that the subsidiary is the alter-ego of the parent or a unity of interest, and that a subsidiary was used by a parent to promote fraud or injustice). A veil-piercing standard will be applied when a subsidiary is a sham designed by the parent to avoid direct liability. See *id.* at 16. But see *Schiavone*, 79 F.3d at 253 (noting that “[a]n interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and purpose of [CERCLA]”).

⁹⁷ 524 U.S. 51 (1998).

⁹⁸ See generally CERCLA, 42 U.S.C. §§ 9601–9675 (1994 & Supp. III 1997).

⁹⁹ See generally *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549 (W.D. Mich. 1991).

¹⁰⁰ In *Bestfoods*, the Supreme Court vacated the ruling of the Court of Appeals of the Sixth Circuit and remanded the case to the trial court for further proceedings in line with the Court's final resolution. See *Bestfoods*, 524 U.S. at 73. See generally *United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997). In addition, the provision at the center of debate in this decision was CERCLA § 107, 42 U.S.C. § 9607 (1994). This provision deals specifically with the types of parties who can be liable under CERCLA for hazardous waste contamination. The main issue in this controversy is whether a parent corporation qualifies as an owner or operator of a facility if the parent owns a subsidiary who qualifies as an owner or operator and who is liable under CERCLA. See *supra* Part II.A (discussing CERCLA section 107).

¹⁰¹ See *supra* Part II.C (considering the different approaches taken by the circuits in dealing with parent liability under CERCLA).

A. Recitation of the Facts

During the 1950s, a chemical company began manufacturing chemicals at a site near Muskegon, Michigan.¹⁰² In 1965, CPC International Inc., now known as Bestfoods,¹⁰³ formed a wholly owned subsidiary, Ott Chemical Company, to purchase the assets of this Michigan chemical manufacturer.¹⁰⁴

While Ott was a legally separate entity, Bestfoods did maintain control of some management decisions within the subsidiary, such as the appointment of Bestfood employees to positions of influence within the Ott organization.¹⁰⁵ For example, Bestfoods integrated the employees (and even the sole shareholder) of the original chemical company into the newly formed subsidiary and placed some of these individuals on Ott's board of directors. Bestfoods then appointed the sole shareholder of the original chemical company and an officer of Ott Chemical, Anthony Ott, to a position on the board of directors for Bestfoods.¹⁰⁶ In addition, throughout their relationship as parent and subsidiary, one Bestfoods employee, G.R.D. Williams, contributed in a "significant" way to Ott's environmental compliance policies.¹⁰⁷ Therefore, Bestfoods' presence behind Ott was evident through its control of management decisions and appointments. This arrangement lasted until Bestfoods sold Ott Chemical to another corporation in 1972.¹⁰⁸ That corporation went bankrupt in 1977.¹⁰⁹

Both the original chemical company and Ott Chemical owned and manufactured chemicals at the Michigan facility;¹¹⁰ and, in addition, they both had a policy of dumping hazardous wastes at this site.¹¹¹ The dumping of toxic residues resulted in heavy contamination of the soil and ground water. In fact, the site was so contaminated that when the Michigan Department of Natural Resources evaluated the site "it found the land littered with thousands of leaking and even exploding drums of waste, and the soil and water saturated with noxious chemicals."¹¹²

The Michigan Department of Natural Resources helped the bankrupt company that had purchased Ott Chemical find a buyer for the site who was

¹⁰² See *Bestfoods*, 524 U.S. at 56 (noting that the original chemical company was also named Ott Chemical Company).

¹⁰³ See *id.* at 56 n.3.

¹⁰⁴ See *id.* at 56.

¹⁰⁵ See *id.* at 56-57.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 59.

¹⁰⁸ See *id.* at 57.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 57-58.

¹¹¹ See *id.*

¹¹² *Id.* at 57.

willing to help with the clean-up costs.¹¹³ The buyer was a wholly owned subsidiary, Cordova/Michigan, Inc., which was owned by Cordova/California, Inc. Cordova/California was in turn the wholly owned subsidiary of Aerojet-General Corporation.¹¹⁴ These facts are only relevant because while Cordova/Michigan continued to manufacture chemicals at the site, it did not add to the environmental damage and indeed did help with the initial clean-up costs of the site. However, the federal Environmental Protection Agency (EPA) became involved with the clean up under CERCLA and re-estimated the clean-up costs to be much more than originally anticipated. In fact, they were estimated to be "well into the tens of millions of dollars."¹¹⁵ Under CERCLA, the federal government is permitted to recoup the costs of environmental clean up from specific parties that are potentially responsible for the environmental harm.¹¹⁶ In 1989, the United States filed suit naming as defendants Bestfoods, the only shareholder of the original chemical company (Anthony Ott), the current owner (Cordova/Michigan) and its parent corporations (Cordova/California and Aerojet-General).¹¹⁷ The Supreme Court only discussed CERCLA liability for Bestfoods in its role as the parent of a subsidiary.

B. District Court's Analysis

The District Court for the Western District of Michigan held Bestfoods liable as an "operator" because it, as a parent corporation, "actively participat[ed]" in the affairs of its subsidiary, Ott Chemical.¹¹⁸ CERCLA imposes liability on past and present operators of facilities.¹¹⁹ The district court found that Bestfoods was liable as an "operator" under the CERCLA definition because Bestfoods had "actively participated" in the management of Ott Chemical, and because Ott was the operator of the Michigan site.¹²⁰ In reaching this conclusion, the district court

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 57 n.5.

¹¹⁶ See CERCLA § 107, 42 U.S.C. § 9607 (1994) (defining the four categories of potentially liable parties); see also *supra* note 21 and accompanying text.

¹¹⁷ See *Bestfoods*, 524 U.S. at 57–58 (noting that the government filed suit against five potentially liable defendants: Bestfoods, Aerojet-General, its wholly owned subsidiaries, and the owner of the original chemical corporation, Anthony Ott. The subsidiary of Bestfoods, Ott Chemical, was no longer in existence at the time of the suit).

¹¹⁸ *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 573 (W.D. Mich. 1991); see also *Bestfoods*, 524 U.S. at 58–59 (considering the district court's analysis).

¹¹⁹ See CERCLA § 107(a)(2), 42 U.S.C. § 9607 (1994). The parties in this case stipulated that the Michigan site was indeed a facility within the CERCLA definition and that there was hazardous waste contamination which made CERCLA applicable; see also *Bestfoods*, 524 U.S. at 58–59.

¹²⁰ See *Aerojet-General*, 777 F. Supp. at 573. See *supra* Part II.C.1 (discussing the "actual

found that Bestfoods and its subsidiary shared officers and directors, and that Bestfoods' employees contributed to Ott's environmental policies and made other executive decisions for the subsidiary significant in finding the parent liable.¹²¹ According to the district court, a parent could be liable as an operator by "actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste,"¹²² but could not be liable if it was merely exercising oversight functions to protect its investment.¹²³

C. Sixth Circuit's Analysis

The Sixth Circuit rejected the district court's analysis and held that Bestfoods was not liable as an operator under CERCLA because of the traditional common law notion that owners of corporations are entitled to limited liability, regardless of whether the owner is a shareholder or another corporation.¹²⁴ When analyzing CERCLA's definition of persons, section 101(21),¹²⁵ the Sixth Circuit did not find parent corporations to be expressly included in the definition of persons for the statute's purposes.¹²⁶ The court noted that one rule of statutory interpretation states that common law concepts are not abrogated by congressional statutes unless the statute specifically expresses such an intention.¹²⁷ Therefore, the majority held that a parent corporation could not be directly liable as an "operator" under CERCLA due to the common law notion of limited liability.¹²⁸ A parent corporation, according to the Sixth Circuit, could only be derivatively liable as an operator if "the requirements necessary to pierce the corporate veil are met."¹²⁹

The Sixth Circuit held that Bestfoods was not liable under CERCLA because its corporate veil was not pierced.¹³⁰ The court applied the Michigan veil-piercing

control" test).

¹²¹ See *Aerojet-General*, 777 F. Supp. at 573.

¹²² *Id.*

¹²³ See *id.*

¹²⁴ See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 579-80 (6th Cir. 1997). See *supra* Part II.B.1 (discussing limited liability).

¹²⁵ See CERCLA § 101(21), 42 U.S.C. § 9601(21) (1994); see also *supra* note 22 for the text of this section.

¹²⁶ See *Cordova Chem. Co.*, 113 F.3d at 579.

¹²⁷ See *id.* at 580 (according to the decision there is a strong presumption that when a statute does not address an issue, then the common law applies); see also *United States v. Bestfoods*, 524 U.S. 51, 62-63 (1998) (agreeing with this general presumption).

¹²⁸ See *Cordova Chem. Co.*, 113 F.3d at 580. See generally *Bestfoods*, 524 U.S. at 58-59 (considering the Sixth Circuit's analysis).

¹²⁹ *Cordova Chem. Co.*, 113 F.3d at 580. See generally *supra* Part II.B.1.a (defining and discussing the concept of "piercing the corporate veil").

¹³⁰ See *Cordova Chem. Co.*, 113 F.3d at 580-81.

standard¹³¹ which requires not only a showing of unity of interest, but also a showing that the subsidiary was used by the parent to perpetuate fraud.¹³² Since Bestfoods respected corporate formalities by treating Ott as a separate entity, and since there was no evidence of fraud or injustice, the Sixth Circuit determined that the state veil-piercing standard was not satisfied.¹³³

IV. *UNITED STATES V. BESTFOODS*: THE SUPREME COURT SETTLES THE SPLIT

The Supreme Court in *Bestfoods*¹³⁴ held that a corporate parent cannot be derivatively liable as an operator unless the corporate veil can be pierced.¹³⁵ The Court declined to address whether the veil had been pierced in this case, because the parties had not addressed that issue on appeal. Therefore, the Sixth Circuit's decision holding that Bestfoods was not derivatively liable under Michigan veil-piercing standards still applied.¹³⁶

Yet the Supreme Court added a twist: The Court disagreed with the Sixth Circuit's analysis and found that there is another way a parent corporation can be liable under CERCLA. A parent corporation can be directly liable as an operator if they operate the facility themselves.¹³⁷

Therefore, the "actual control" test articulated by some circuits will no longer be applicable because under that test a parent could be liable if the parent controlled the subsidiary's business or management without regard to whether the parent controlled the facility.¹³⁸ Thus, according to the Supreme Court, the key to

¹³¹ See *id.*; see also *infra* Part V.C (considering whether state or federal veil-piercing law should be applied under CERCLA).

¹³² See *Cordova Chem. Co.*, 113 F.3d at 580.

¹³³ See *id.*

¹³⁴ *United States v. Bestfoods*, 524 U.S. 51 (1998).

¹³⁵ See *id.* at 63–64 (agreeing with the Sixth Circuit that only when the corporate veil can be pierced may a corporate parent be derivatively liable under CERCLA).

¹³⁶ See *id.* at 64 n.9 (listing conflicting case law that has addressed the issue of state versus federal veil-piercing standards for derivative liability under CERCLA, but declining to make a decision on which common law should be applied in this circumstance, because the issue was not addressed by the parties. Therefore, the finding of the Sixth Circuit that Bestfoods, was not derivatively liable as an operator under Michigan veil-piercing standards still applies in this case); see also *infra* Part V.C.

¹³⁷ See *Bestfoods*, 524 U.S. at 68 (finding that liability as an operator in this case should depend on the "relationship between [Bestfoods] and the Muskegon facility itself"); see also *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996) (stating that direct liability as an operator can be attached to a parent corporation if they control the polluting facility).

¹³⁸ See *Bestfoods*, 524 U.S. at 66 (finding that the actual control test confuses direct and indirect liability of a parent corporation because it is "administered by asking a question about the relationship between the two corporations (an issue going to indirect liability) instead of a question about the parent's interaction with the subsidiary's facility (the source of any direct

finding a parent corporation directly liable as an operator is that the parent must operate the facility.¹³⁹

A. Derivative Liability Under Bestfoods

Under *Bestfoods*, a parent corporation can only be derivatively liable under CERCLA if the corporate veil can be pierced.¹⁴⁰ The Court found that CERCLA does not expressly "rewrite" the traditional common law concept of limited liability.¹⁴¹ Therefore, because limited liability is just as applicable to a parent-subsidiary relationship as it is to a corporation-shareholder relationship, a parent cannot be liable unless an exception to limited liability applies, or, in other words, unless the corporate veil can be pierced.¹⁴²

The Supreme Court found that veil piercing is a "fundamental principle of corporate law" that can be applied to find a parent derivatively liable for the actions of its subsidiary when "the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the [parent's] behalf."¹⁴³ Therefore, for a parent to be derivatively liable under CERCLA, as in other circumstances without statutory abrogation, the corporate veil has to be pierced.¹⁴⁴

liability)").

¹³⁹ See *id.* at 66–68 ("The question is not whether the parent operates the subsidiary, but rather whether it operates the facility . . ."); see also *United States v. Brighton*, 153 F.3d 307, 313–14 (6th Cir. 1998) (stating that operator liability can be direct liability when the parent corporation exercises control over the polluting or contaminated facility). This case follows *Bestfoods* and remands the case for a factual determination of whether the parent was an operator in this case. See *id.* at 316.

¹⁴⁰ See *Bestfoods*, 524 U.S. at 62–67 ("The Court of Appeals was accordingly correct in holding that when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions").

¹⁴¹ See *id.* at 62 ("Nothing in CERCLA purports to rewrite this well-settled rule, either"); see also *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) ("[A]ny bold rewriting of corporation law in this area [of parent liability] is best left to Congress."). For a view of the Supreme Court's treatment of congressional silence in other areas, see generally *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979), which states that "silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely."

¹⁴² See *Bestfoods*, 524 U.S. at 62.

¹⁴³ See *id.* at 62–63.

¹⁴⁴ See *id.* at 63 ("CERCLA is thus like many other congressional enactments in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute, . . . and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law . . .'"') (citations omitted); see also *Joslyn Mfg. Co.*, 893 F.2d at 83 ("Without an express Congressional directive to the

The Court declined to decide whether state or federal veil-piercing standards should be applied in this context because the issue was not addressed by the parties on appeal.¹⁴⁵ This omission by the Court leaves lower courts to determine which law to apply to parent-subsidiary relationships under CERCLA. The Comment will explore this issue in Part V.C.¹⁴⁶

Finally, the Court stated that derivative liability can apply to a parent as both an owner and operator under CERCLA when the veil is pierced.¹⁴⁷ Thus, if a subsidiary operates a facility that is owned by another party, the parent can be derivatively liable as an operator if the corporate veil can be pierced. This point dispelled some of the prior commentary on the issue, which speculated that operator liability was direct liability and owner liability was derivative liability.¹⁴⁸ By emphasizing this point, the Court made it clear that mere ownership of a subsidiary is not important by itself to liability under CERCLA, but that the standards of veil piercing need to be met unless the parent is taking actions for itself which constitute the operation of a facility.

B. Direct Liability Under *Bestfoods*

The majority of the *Bestfoods* opinion addressed the issue of direct liability of a parent corporation under CERCLA.¹⁴⁹ The Court made clear that a parent

contrary, common law principles of corporation law, such as limited liability, govern our court's analysis.").

This concept has been extended to other contexts outside of CERCLA regulation. *See, e.g.*, *United States v. Dell'Aquila*, 150 F.3d 329 (3d Cir. 1998) (finding that *Bestfoods*' derivative operator liability standard for a parent corporation also applies in the context of the Clean Air Act); *Papa v. Katy Indus.*, 166 F.3d 937 (7th Cir. 1999) (finding that derivative liability can exist under other federal statutes such as the Americans With Disabilities Act); *United States v. Green*, 33 F. Supp. 2d 203 (W.D.N.Y. 1998) (applying *Bestfoods*' derivative liability analysis to corporate shareholders who managed a company, but did not make decisions concerning the corporation's hazardous waste disposal practices).

¹⁴⁵ *See Bestfoods*, 524 U.S. at 63 n.9.

¹⁴⁶ *See also supra* Part II.B.1 (discussing the differences in veil-piercing standards in different jurisdictions).

¹⁴⁷ *See Bestfoods*, 524 U.S. at 64 (hypothesizing that if a subsidiary operates a facility without ownership and the subsidiary is so controlled by its parent for improper purposes that veil piercing is warranted, then the parent can only be derivatively liable as an operator of the facility, not an owner. However, a parent could be derivatively liable as an owner if veil piercing was warranted and the subsidiary was the owner of the facility).

¹⁴⁸ *See generally* *Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996) (holding that a parent can only be liable as an owner if the corporate veil can be pierced and liable as an operator if the parent actually operated the facility, without regard to its control of the subsidiary); *United States v. USX Corp.*, 68 F.3d 811, 823 (3d Cir. 1995); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1220 (3d Cir. 1993); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15 (D. R.I. 1989), *aff'd*, 910 F.2d 24, 27 (1st Cir. 1990).

¹⁴⁹ *See Bestfoods*, 524 U.S. at 51.

corporation can only be derivatively liable when the corporate veil can be pierced under corporate common law.¹⁵⁰ However, the Court stated that a corporate parent can also be liable in another way. A parent can be directly liable as an operator under CERCLA if the parent controls the "facility" that produces or contains the hazardous waste exposure.¹⁵¹ The key to direct liability, according to the Court, is that the parent must exercise actual control over the facility (without regard for the parent's control of its subsidiary). Therefore, the Court makes clear that for Bestfoods to be directly liable the "analysis should . . . have rested on the relationship between [Bestfoods] and the Muskegon facility itself."¹⁵²

Direct liability under CERCLA can apply to any "person" who "operates" a "facility."¹⁵³ To reach this conclusion, one must note that corporations, in general, are included under the definition of persons who can be operators or owners under CERCLA,¹⁵⁴ and a parent corporation is by definition a corporation. Therefore, if a parent corporation sufficiently operates any facility, then it can be held liable as an operator for the clean-up costs associated with that facility (regardless of whether its subsidiary owns the facility in question).¹⁵⁵ In addition, since the parent is operating the facility, it can be viewed as a more responsible entity so that we worry less about imposing the clean-up costs on it, as opposed to a parent who merely owns a subsidiary, but takes no affirmative action of its own to contribute to the hazardous conditions.¹⁵⁶

The Court also established a standard for determining whether a parent corporation is directly liable for the operation of a facility. The Court reasoned

¹⁵⁰ See *id.* at 62–64.

¹⁵¹ See *id.* at 64 ("[N]othing in [CERCLA's] terms bars a parent corporation from direct liability for its own actions in operating a facility owned by its subsidiary"); see also *Donahey v. Livingstone*, 118 S. Ct. 1876 (1998) (following the definition of "operator" articulated in *Bestfoods*); *United States v. Brighton*, 153 F.3d 307, 314 (6th Cir. 1998) (same). See generally *Amatek Inc. v. Pioneer Salt*, 709 F. Supp. 556, 559 (E.D. Pa. 1988) (noting in a case which is a prelude to *Bestfoods*, that operator liability is based on the "degree" of control of an individual entity over the facility); *LIGHT*, *supra* note 21, at 98–99 (looking to the Clean Water Act as an analogy). *Light* notes that section 311 of the Clean Water Act holds individuals liable if they are in charge of a facility. See *id.*; see also *Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227 (D. Colo. 1989) (adopting liability test based on the test in the Clean Water Act).

¹⁵² *Bestfoods*, 524 U.S. at 66–68.

¹⁵³ CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).

¹⁵⁴ See CERCLA § 101(21), 42 U.S.C. § 9601(21) (1994); see also *Schiavone v. Pearce*, 79 F.3d 248, 254–55 (2d Cir. 1996) (stating that corporations as entities are included in the definition of person under CERCLA, so if a parent corporation operates a facility it can be held directly liable under CERCLA).

¹⁵⁵ See *Bestfoods*, 524 U.S. 64–65 (stating that if a facility is owned by a subsidiary, but the parent corporation operates the facility, then the parent can be directly liable for its actions).

¹⁵⁶ Thus, this ruling seems to comply with the actual goal of CERCLA to hold those responsible for the pollution liable for the costs. Under this approach, a parent is liable for its own actions in operating a facility, and not the actions of its subsidiary.

that an operator under CERCLA is an entity that “directs the workings of, manages, or conducts the affairs of a facility”¹⁵⁷ or more specifically “manage[s], direct[s], or conduct[s] operations . . . related to pollution. . . .”¹⁵⁸

Some guideposts were articulated by the Court to determine what actions would constitute the operation of a facility under the established standard. Courts, under this analysis, should consider whether a parent “manage[d], direct[ed], or conduct[ed]” operations at the facility such as “disposal of hazardous waste, or decisions about compliance with environmental regulations.”¹⁵⁹

However, the Court cautioned that actions of joint officers and board members (members of both the subsidiary and the parent) are presumed to be attributable to the entity for which the individual is acting at the time the action is taken.¹⁶⁰ Therefore, an action taken by a joint officer who is working in his capacity as an employee for the parent would probably be insufficient by itself to assign direct liability to the parent corporation¹⁶¹ unless “norms of corporate

¹⁵⁷ *Bestfoods*, 524 U.S. at 66–67 (finding that CERCLA intended “operator” to be defined in the “organizational sense” of the word which means to “conduct the affairs of” or “manage” a facility).

¹⁵⁸ *Id.* at 66.

¹⁵⁹ *Id.* at 66–70; see also *United States v. Brighton*, 153 F.3d 307, 315 (6th Cir. 1998) (finding that the government can be liable as an operator if its regulatory actions over a facility are extensive enough to go beyond mere oversight and constitute management of the facility); *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 648–49 (7th Cir. 1998) (finding that a parent is directly liable if it manages or directs the operations of a facility that are specifically related to pollution, regardless of whether the parent also manages the subsidiary); *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996) (noting that the court in this case would have considered as evidence of a parent’s control of a facility whether the parent’s employees negotiated a renewal contract for the continued operation of the facility, and whether the parent’s employees controlled the capital expenditures of the facility).

In addition, see *Browning-Ferris Indus. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998), a recent federal decision that applies the direct liability test of *Bestfoods* to find a parent corporation liable under CERCLA. The evidence in *Browning* showed that there were communications (letters) between waste transporters of the subsidiary’s facility and the parent corporation concerning activities at the facility. The subsidiary also paid the parent a management fee to conduct administrative functions at the facility. In addition, the president of the parent corporation (acting in his capacity as the parent president and not as director for the subsidiary) communicated with the Illinois EPA concerning the facility, with another Illinois agency to obtain a noise permit for the facility, and with an environmental consultant of the parent about clean-up efforts at the facility. See *id.* at 763. Citing this evidence, the District Court found that the parent was directly liable as an operator of a facility.

However, the court did not find the parent’s president liable because the corporate veil was not capable of being pierced. The court’s analysis rested on the state veil-piercing standard of Illinois as the state of incorporation. See *id.* at 763.

¹⁶⁰ See *Bestfoods*, 524 U.S. at 66–67.

¹⁶¹ See *id.* at 69 (“[C]ourts generally presume ‘that the directors are wearing their subsidiary hats and not their parent hats when acting for the subsidiary’” therefore, actions by dual officers are insufficient to attribute direct liability to a parent) (citations omitted).

behavior" reveal that such an action will significantly harm a subsidiary, yet benefit the parent.¹⁶²

In addition, the Supreme Court also suggests that actions taken by an employee of the parent, who does not also serve the subsidiary, might be enough to hold a parent directly liable, if the actions would be considered "controlling or managing a facility."¹⁶³ Yet the Court cautions that mere oversight actions by a parent are insufficient to assign direct liability to it; thus, corporate norms distinguishing oversight activities and operating activities are extremely important to this determination.¹⁶⁴ The Court wrote: "The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility."¹⁶⁵ The Court hypothesized, without coming to a conclusion in this case, that the actions taken by the employee of the parent, G.R.D. Williams (who was not a joint officer), might rise to the level of direct liability for a parent. According to the Supreme Court, the district court had found that Williams was "directly involved" with the subsidiary's environmental policies and had "control" over its environmental considerations.¹⁶⁶ However, the Supreme Court left such a factual question for the trial court to determine on remand.¹⁶⁷

V. THE IMPACT OF THE DECISION

The Court's decision in *United States v. Bestfoods* will change the law in this area, especially for those circuits which were using the "actual control" or "authority to control" tests to determine operator liability for a parent corporation under CERCLA. Yet the law will also change for those circuits which only found operator liability when the corporate veil was capable of being pierced.¹⁶⁸ With such changes, it is important to identify the strengths and weaknesses of the

¹⁶² See *id.* at 71. ("[A] director might depart so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility," and when this happens a parent can be directly liable for the actions of a dual officer).

¹⁶³ See *id.* at 71; see also *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996) (suggesting that actions taken by employees of a parent in controlling a facility or its operation can make the parent directly liable).

¹⁶⁴ See *Bestfoods*, 524 U.S. at 71 (stating that mere oversight by a parent employee must be distinguished from operating the facility of the subsidiary).

¹⁶⁵ *Id.* at 72.

¹⁶⁶ *Id.* at 72-74; see also *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 561 (W.D. Mich. 1991).

¹⁶⁷ See *Bestfoods*, 524 U.S. at 72-73.

¹⁶⁸ See *United States v. Brighton*, 153 F.3d 307, 313-14 (6th Cir. 1998) (stating that it follows *Bestfoods*' determination that a parent can be directly liable if it controls or manages a facility of its subsidiary); *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 648-49 (7th Cir. 1998).

Supreme Court's approach and determine what issues will be important in the future for parent liability under CERCLA.

A. *Veil Piercing for Derivative Liability*

Under *Bestfoods*, a parent can be derivatively liable as an operator or owner only when a showing is made that the subsidiary is the alter-ego of the parent, and, in some jurisdictions, that the subsidiary has been used to perpetrate fraud or avoid personal liabilities.¹⁶⁹ While this might be considered a disappointing decision for environmental advocates because it makes it more difficult to find a parent corporation—which may have deeper pockets than the subsidiary—derivatively liable, it was probably correct since it complies with the rules of statutory interpretation and traditional notions of limited liability.

1. *Reasons Why Bestfoods Is Correct About Derivative Liability*

There are several reasons why the Court was correct in deciding that derivative liability for a parent under CERCLA could only occur when the facts were present to justify piercing the corporate veil. First, this decision upholds the common law tradition of limited liability by treating the parent and the subsidiary as separate entities unless the parent is going beyond mere ownership of its subsidiary and is, in reality, the same entity.¹⁷⁰ By respecting this common law tradition, corporations who own a subsidiary, but are merely using an oversight function, cannot be found liable for the harmful actions of a subsidiary absent some affirmative action on the part of the parent to contribute to the contamination.¹⁷¹ In today's corporate world, it is a very possible scenario that a parent could own a subsidiary merely as an investment, and exercise no control over the subsidiary's operations or even have any knowledge of the subsidiary's environmental polices. Under *Bestfoods*, such corporations are protected like any other shareholder by limited liability principles.¹⁷²

¹⁶⁹ See *Bestfoods*, 524 U.S. at 62–64.

¹⁷⁰ See *id.*; see also *supra* Part II.B.1.a (discussing various factors that tend to lead to the piercing of a corporate veil, among them a showing that the subsidiary is the parent's alter-ego).

¹⁷¹ See *Bestfoods*, 524 U.S. at 70 (discussing the role of corporate norms as providing the limits for a parent's direct liability under the control of a facility test). "Just as we may look to such [corporate] norms in identifying the limits of the presumption that a dual officeholder acts in his ostensible capacity, so here we may refer to them in distinguishing a parental officer's oversight of a subsidiary from such an officer's control over the operation of a subsidiary's facility." *Id.* at 71; see also *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996).

¹⁷² See generally *Bestfoods*, 524 U.S. at 51. Yet proponents of the actual control test could argue that such an individual would be protected under that test as well. Since the actual control test considers whether the parent had actual control over the subsidiary's actions, a parent such as this might not be liable if they failed to exert control over the day-to-day operations of the subsidiary. But, the question still remains: What if the parent did manage one portion of the

Because CERCLA was passed in 1980 and did not directly address the issue of parent liability,¹⁷³ it can be argued that CERCLA was enacted with the knowledge that limited liability existed for parent corporations.¹⁷⁴ It can be assumed that because Congress was aware of the presumption of limited liability and did not address the issue of parent liability in the statute, that it intended for limited liability to apply to parent corporations even under CERCLA.¹⁷⁵ Under traditional corporate common law, the main exception to limited liability—piercing the corporate veil—was a way in which a parent could be found derivatively liable for actions of its subsidiary.¹⁷⁶ Thus, if limited liability applies even under CERCLA, then the way to find a parent derivatively liable under CERCLA is to pierce the corporate veil.¹⁷⁷ Therefore, this logic leads to the conclusion that the Court was correct with its decision in *Bestfoods*, even if it appears to go against the Congressional purpose of CERCLA.¹⁷⁸

Another strength to this approach is that the veil-piercing standard, while not uniform for all jurisdictions, does require a higher standard of proof by the party bringing suit than the “actual control” or “authority to control” tests.¹⁷⁹ Under a veil-piercing approach, courts must consider a laundry list of factors to first make a finding that the subsidiary and the parent are indeed alter-egos of one another.¹⁸⁰ This standard requires the court to determine whether the parent and

subsidiary’s activities? For example, consider the following factual scenario: A subsidiary investment is not making the expected return for the parent and the parent seeks to remedy the inefficient behavior by taking control of the subsidiary’s finances. Under the actual control test, the parent could be liable even if the parent had no connection to any environmental aspects of the subsidiary and had not even attempted to control the subsidiary’s policy in that area. These are the corporations that the decision in *Bestfoods* protects the most: parent companies who are exercising limited control over the conduct of a subsidiary without any control in the environmental compliance realm. In some respects, this seems more like the situation of traditional stockholders—in which control is not vested in the same hands as ownership. Thus, these parents seem less responsible for the clean-up costs.

¹⁷³ See CERCLA § 101(21), 42 U.S.C. § 9601(21) (1994) (defining “persons” under CERCLA, but failing to specifically include parent corporations); *supra* Part II.A.

¹⁷⁴ See *Bestfoods*, 524 U.S. at 61.

¹⁷⁵ See *id.* at 52. (stating that “CERCLA does not purport to reject this bedrock principle [of limited liability for parent corporations], . . . and against this venerable common law backdrop, the Congressional silence is audible”).

¹⁷⁶ See *supra* Part II.B.1.a (defining and discussing “piercing the corporate veil”).

¹⁷⁷ See *supra* Part II.B.1. See generally *United States v. Cordova Chem. Co.*, 113 F.3d 572, 590–91 (6th Cir. 1997); *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir. 1990).

¹⁷⁸ See *Bestfoods*, 524 U.S. at 62–65. See generally *supra* Part II.A (discussing CERCLA’s goals).

¹⁷⁹ See *supra* Part II.C.1–2 (discussing the actual control and capacity to control tests for parent liability under CERCLA prior to *Bestfoods*).

¹⁸⁰ See *supra* Part II.B.1.a.i (discussing the factors that courts consider when determining if a subsidiary is an alter-ego for the parent).

the subsidiary commingled funds, whether the parent had the right to obligate the subsidiary, whether the parent was the only entity with which the subsidiary did business, and whether the parent actually conducted business affairs for the subsidiary so as to benefit the parent.¹⁸¹

While similar factors might be considered under the actual control test, that test required a lesser showing.¹⁸² For example, a court could find that in most aspects the parent respected the corporate form—the two corporations kept separate accounts and financial books; the parent required that the subsidiary have a board of directors and corporate board meetings; the parent had no control over the subsidiary's business activities or its right to contract; the parent did not finance the subsidiary or drain it of assets; and the parent allowed the subsidiary to hire and fire its own employees¹⁸³—but because the parent implemented a production process into the subsidiary's daily operations, that parent might be in actual control of the subsidiary, and thus, liable.¹⁸⁴ In contrast, under a veil-piercing standard, to find that a subsidiary is an alter-ego of a parent, the required showing is higher: Few if any corporate formalities are respected, most aspects of the two corporations are commingled, and the subsidiary's actions are routinely for the benefit of the parent and not its own best interest.¹⁸⁵ In addition, in jurisdictions that require a showing that the subsidiary is being used for fraudulent purposes, the veil-piercing standard is heightened even more.¹⁸⁶ Also, it is obvious that the veil-piercing standard requires a higher showing of proof than actual control test or capacity to control tests. Otherwise, courts would have adopted a veil-piercing standard under CERCLA and would not have formulated an entirely new test to circumvent the traditional principle of limited liability. Therefore, under the *Bestfoods* requirements, parents are more protected from liability and less likely to be held derivatively liable under CERCLA—a result which appears to be more closely in line with other areas of law where there is not express abrogation of limited liability.¹⁸⁷

Finally, this new standard also abides by traditional rules for statutory interpretation of congressional silence. Under these rules, the common law should

¹⁸¹ See *supra* note 60 (listing the factors to be considered under the alter-ego test).

¹⁸² See *supra* Part II.C.1; *supra* note 78.

¹⁸³ See *supra* Part II.C.1 (performing a similar discussion of the factors included under the actual control test); *supra* note 75.

¹⁸⁴ See generally *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 573 (W.D. Mich. 1991) (finding that actual control was established in similar, but not identical circumstances to the ones proposed).

¹⁸⁵ See *supra* note 60 and accompanying text.

¹⁸⁶ See *AT&T Global Info. Solutions v. Union Tank Car Co.*, 29 F. Supp. 2d 857 (S.D. Ohio 1998) (determining that the Ohio veil-piercing standard requires a lesser showing than fraud).

¹⁸⁷ See *KLEIN & COFFEE*, *supra* note 13, at 139–41.

be upheld in the absence of express congressional intent.¹⁸⁸ The Court does make it clear that if Congress actually intended to hold parent corporations liable without requiring that the corporate veil be pierced, then CERCLA could be amended to expressly include parent corporations in the list of persons which are potentially responsible parties—thus, expressly abrogating limited liability for parents under CERCLA.¹⁸⁹ Therefore, if Congress feels that a parent corporation should be liable in this situation, then Congress could amend CERCLA accordingly to achieve this goal.¹⁹⁰

2. *The Negative Side of Derivative Liability Under Bestfoods*

While the Court was correct in requiring that the corporate veil be pierced to find a parent corporation derivatively liable under CERCLA, there are some negative consequences to this decision. For example, by requiring a more narrow standard to achieve derivative liability, the Court in this case has in some respects stifled the goal of CERCLA.¹⁹¹ CERCLA's goal is to force those who contributed to the contamination of a facility to internalize the costs of its clean up.¹⁹² Under *Bestfoods*, this goal can be circumvented by careful parents who use dual officers to dictate the subsidiary's environmental policies; who respect corporate formalities, but informally operate the subsidiary and its facility though mandatory advice; and who control the subsidiary's management and policy decisions concerning certain activities which relate to environmental considerations, but which would not be considered direct control over the facility in question.¹⁹³ Therefore, under this approach, parent corporations can use a

¹⁸⁸ See *United States v. Bestfoods*, 524 U.S. 51, 61–62 (1998); see also *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979) (stating that statutory silence should not be interpreted to override common law).

¹⁸⁹ See *Bestfoods*, 524 U.S. at 62–63; *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) (suggesting that Congress is free to change this liability if it really intended CERCLA to abrogate limited liability for parent corporations).

¹⁹⁰ See generally *Bestfoods*, 524 U.S. 51.

¹⁹¹ See *Brown*, *supra* note 91, at 279 (discussing the *Cordova* decision on the issue of parent liability (which the Court discusses approvingly in *Bestfoods*) as “completely undermin[ing] the purposes of CERCLA”).

¹⁹² See *supra* Part II.A.

¹⁹³ See *Brown*, *supra* note 91, at 279 (suggesting that parents can benefit from controlling subsidiaries without worrying about liability under a decision that requires a veil-piercing standard). Here is an example of what might occur under this decision: A parent corporation could dictate the production process a subsidiary will use in its daily operations. The production process the parent chooses results in hazardous waste residues. The parent does not tell, mandate, or even advise the subsidiary how to deal with the waste, so that it cannot be considered in control of the waste itself. The parent also respects all other corporate formalities, except that it leaves the subsidiary with only a limited budget every year, because it uses joint officers acting in their capacity as agents for the subsidiary to pay dividends to the parent on a

subsidiary to undertake all the environmentally risky activities which the parent will wish to avoid out of fear of liability. Thus, so long as the corporate form is respected, especially when considering the presumption about joint officers and directors,¹⁹⁴ a parent will not be liable even if the subsidiary does not have the resources to absorb the costs of clean up.¹⁹⁵ Therefore, under *Bestfoods*, a party which is arguably responsible in some way for the contamination can avoid, legally, the liability and force the government and taxpayers to bear the costs.¹⁹⁶

The Court did seem to recognize this drawback to its decision, and thus, disagreed with the circuits who would hold a parent liable only if the corporate veil was pierced.¹⁹⁷ *Bestfoods* does allow for parent corporations to be directly liable for their own actions in operating a facility.¹⁹⁸ Thus, sometimes, parents who are trying to avoid liability by using a subsidiary will be liable if the parents take too much control over the facility's operation and management.

B. *The Potential Benefits of Direct Liability Under Bestfoods*

As previously addressed, the Supreme Court in *Bestfoods* required that the corporate veil be pierced to find a parent derivatively liable which makes the standard more difficult than some of the circuits had previously anticipated. However, the Court also held that a parent corporation can be directly liable under CERCLA if it controls a subsidiary's facility.¹⁹⁹ This approach forces courts to consider the relationship between the facility and who is in control of the facility,

regular basis. The parent then invests the dividends into itself, which it is legally allowed to do. Because of this, the subsidiary cannot afford to implement the top-of-the-line waste prevention methods that have developed for its industry. Contamination occurs as a result of the subsidiary's factory site. The parent in this situation will legally not be responsible for the clean up, because it respected the corporate form enough to avoid liability. It is, though, arguably responsible in some way for the contamination. However, unless a court finds that implementing a production process gives rise to control of the facility for a finding of direct liability, the parent will avoid liability altogether and the site's clean up will be left to the taxpayers.

¹⁹⁴ See *Bestfoods*, 524 U.S. at 70 (discussing the presumption that joint officers are deemed to be acting for the entity for which their action is taken, even if the action does not benefit that entity in reality).

¹⁹⁵ See KLEIN & COFFEE, *supra* note 13, at 140 (stating that undercapitalization of a subsidiary is an important consideration under a test for veil piercing, but that it is not sufficient in and of itself to justify piercing the corporate veil).

¹⁹⁶ See generally *Bestfoods*, 524 U.S. at 51 (noting that a parent will not be derivatively liable unless the corporate veil can be pierced).

¹⁹⁷ See *id.* at 67 (rejecting the Sixth Circuit's determination in *Cordova Chem. Co.* that a parent can be liable only when the veil is pierced).

¹⁹⁸ See *id.* at 65-67.

¹⁹⁹ See *id.*

and to analyze what role the parent plays in that relationship.²⁰⁰ This holding compliments its decision on derivative liability and gives the party bringing suit another alternative with which to seek liability. Thus, if the party cannot meet the veil-piercing standard being applied, this decision ensures that parents who actually operate a facility are liable, regardless of whether they are in sufficient control of the subsidiary to warrant derivative liability.

1. *Benefits of Bestfoods' Approach to Direct Liability*

The first benefit to allowing a parent to be directly liable for its own actions is that it also respects the notion of limited liability.²⁰¹ A parent under this decision is not liable for the actions of a subsidiary without meeting the veil-piercing standard, but a parent is liable for its own actions.²⁰² Entities are usually, even considering limited liability concepts, liable for their own actions.²⁰³ This decision respects and upholds that principle.

With this approach, the Court also permits CERCLA's goal—making those responsible for the contamination liable for its costs—to be realized, even while respecting traditional notions of limited liability.²⁰⁴ For example, if an entity is controlling, or managing a facility—a subsidiary's facility or any facility for that matter—then under the language of CERCLA, that entity is indeed responsible for the contamination which occurs.²⁰⁵ The assumption underlying this policy is that if the entity was controlling or managing a facility, then it controlled the facility's environmental policies directly or indirectly, and this would be enough for the entity to be liable under CERCLA.²⁰⁶ Since, under this scenario, a parent would be liable for the costs of the contamination, *Bestfoods* is arguably furthering the goal of CERCLA.

In addition, this approach also seems to comply with the language of section 107(a). Section 107(a) states that any person who is (or was) an "operator" of a "facility" can be liable under CERCLA.²⁰⁷ A parent can be an operator of a facility, regardless of who owns the facility, if the parent corporation acts in such a way that it is deemed to be managing or directing the facility.²⁰⁸ One action which might give rise to such a finding is if an employee for the parent was

²⁰⁰ See *id.* at 67–71.

²⁰¹ See *supra* Part II.B.1 (discussing limited liability).

²⁰² See *Bestfoods*, 524 U.S. at 63–65.

²⁰³ See *id.*

²⁰⁴ See *id.* at 65–67.

²⁰⁵ See *id.*; CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).

²⁰⁶ See *Bestfoods*, 524 U.S. at 66 (discussing the definition of an operator as being in the "operational" sense of the word; thus, an entity is liable if it is "manag[ing], direct[ing], or conduct[ing] operations" of a facility).

²⁰⁷ See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).

²⁰⁸ See *Bestfoods*, 524 U.S. at 66.

authorized to make ultimate decisions for the subsidiary on issues of environmental policy.²⁰⁹

2. Concerns About Bestfoods' Approach to Direct Liability

While this decision permits parents to be directly liable when they control a facility, this test arguably can allow a parent corporation to avoid liability by merely controlling the subsidiary, but not controlling the operation of the facility directly. For example, as the Supreme Court noted, if dual officers exist between the parent and the subsidiary, the actions of the officers are attributed to the corporation for which the action is taken, even if it is not for the benefit of that entity in reality.²¹⁰ Therefore, a parent corporation could actually control a facility through such dual officers, and so long as the dual officers respect corporate norms and formalities and appear to act in their capacities as officers of the subsidiary, the parent can avoid direct liability for its actions.

However, despite this concern, the Court correctly decided that a parent should be liable only for its own actions and not the actions of its subsidiary, unless the corporate veil can be pierced, because CERCLA does not specifically abrogate the limited liability protection of a parent. Thus, under *Bestfoods*, CERCLA's goals are still being accomplished, but as dictated by the specific

²⁰⁹ See *id.*; Part IV.B (fully listing all of the Court's articulated guidelines). In addition, see *Browning-Ferris Indus. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998), a recent federal decision that applies the direct liability test of *Bestfoods* to find a parent corporation liable under CERCLA. The evidence in *Browning-Ferris* showed that there were communications (letters) between waste transporters of the subsidiary's facility and the parent corporation concerning activities at the facility. The subsidiary also paid the parent a management fee to conduct administrative functions at the facility. In addition, the president of the parent corporation (acting in his capacity as the parent president and not as director for the subsidiary) communicated with the Illinois EPA concerning the facility, with another Illinois agency to obtain a noise permit for the facility, and with an environmental consultant of the parent about clean-up efforts at the facility. See *id.* at 64–65. Citing this evidence, the district court found that the parent in this case was directly liable as an operator of a facility.

However, the court did not find the parent's president liable because the corporate veil was not capable of being pierced. The court's analysis rested on the state veil-piercing standard of Illinois as the state of incorporation. See *id.* at 65–66; see also *Olin Corp. v. Fisons PLC*, No. 93-1116-MLW, 1998 U.S. Dist. LEXIS 21967, at *14–*15 (D. Mass. Sept. 22, 1998). In *Olin*, the United States District Court for the District of Massachusetts applied *Bestfoods'* analysis of direct liability to a foreign parent. The court stated that there were three times when a foreign parent could be liable: (1) a parent can be liable when it operates a facility or is involved in operating a facility with its subsidiary as a joint venture; (2) a parent can be liable when a dual officer acts outside the norms of parental oversight and influence in the pollution actions of the subsidiary; (3) a parent can be liable when a parental agent without connections to the subsidiary operates a facility.

²¹⁰ See *Bestfoods*, 524 U.S. at 70 (noting that this will be the presumption unless corporate norms require a different finding or unless the action benefits the parent to the detriment of the subsidiary without a corporate justification).

language of the statute and not judicial interpretation of congressional silence.²¹¹

C. *The Major Omission of Bestfoods: What Standard of Veil Piercing Should Apply?*

One concern with the Supreme Court's approach is that the Court does not establish whether a state or federal veil-piercing standard should be applied to determine parent liability under CERCLA.²¹² This omission will lead to confusion among the circuits and a less than universal approach to parent liability under the federal statute. Some scholars argue that the standard applied should be a federal one, since CERCLA is a federal environmental statute.²¹³ Others argue that individual state standards should apply because different states allocate preferences differently between business and environmental protection interests.²¹⁴ Following this decision's failure to designate which law should apply, courts are able to decide which law should apply in their jurisdiction depending on the policies behind each approach.

1. *Policies Supporting a Federal Veil-Piercing Standard*

The Court declined to address the issue of whether a federal or state veil-piercing standard should be applied to determine if a parent corporation is derivatively liable under CERCLA.²¹⁵ Proponents of a federal standard argue that CERCLA is a federal statute that attempts to regulate environmental hazardous waste across the United States as a whole, and without a uniform standard as to when a violator will be liable, the goals of CERCLA will be frustrated.²¹⁶ These

²¹¹ See generally McKane, *supra* note 82, at 1674 (anticipating that this approach was correct because it complied with the language of CERCLA and yet still accomplished CERCLA's remedial goals).

²¹² See *Bestfoods*, 524 U.S. at 63 n.9 (expressly declining to address the issue).

²¹³ See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 583-86 (6th Cir. 1997) (Merritt, J., concurring in part and dissenting in part) (finding that a federal standard is more appropriate than state standards in this area); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (citing the need for uniformity as its reason for advocating a federal standard in this context); Jay A. McKendree, Note, *Appropriate Federal Rules of Veil-Piercing in Response to United States v. Cordova Chemical Co.*, 23 U. DAYTON L. REV. 419, 429 (1998) (arguing prior to the *Bestfoods* decision that the Supreme Court should adopt a federal common law standard to determine veil piercing under CERCLA).

²¹⁴ See *infra* Parts V.C.1-2 (discussing this issue). See generally HENRY N. BUTLER & JONATHAN MACEY, *USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY* 7 (1996) (arguing that state regulation of environmental issues is appropriate and more efficient than uniform federal regulation).

²¹⁵ See *Bestfoods*, 524 U.S. at 63 n.9.

²¹⁶ See *In re Acushnet River*, 675 F. Supp. 22, 30-32 (D. Mass. 1987). *Acushnet* found that when considering the factors established by *United States v. Kimbell*, 440 U.S. 715, 728-29

proponents argue that a federal statute which seeks to protect the rights of all citizens of the United States should not be trumped by state law which can manipulate the standard depending on whether the state prefers business' interest to environmental protection.²¹⁷ Since a state standard could dictate who is liable under a federal statute, the federal program or goal could be hindered or unfairly restricted by the state's choice of law.²¹⁸

(1979), determining when federal common law should be developed instead of applying state law, that federal common law was the appropriate choice for a veil-piercing standard under CERCLA. The court wrote: "It appears to the court to be true . . . that consideration of the appropriate factors counsels the development of a uniform [federal] rule [under CERCLA]." *In re Acushnet River*, 675 F. Supp. at 31. *See Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 349 (D.N.J. 1991). In *Mobay*, the court argued that because CERCLA is a federal statute whose purpose is to protect the environment and health of the nation, "courts are obliged to construe provisions liberally." *Id.* at 350. This court claimed that Congress wanted the courts to develop a common federal law to "fill in gaps in [the] statute." *Id.* (citing legislative history which stated that CERCLA will encourage the development of a uniform federal law to avoid having known polluters congregate in states with more lenient laws). In addition, the court in *Mobay* found that state common law should not "override federal legislative policies," or "frustrate the compelling national policies underlying CERCLA." *Id.* at 350-51; *see also Kimbell*, 440 U.S. at 728-29 (stating that federal courts deciding whether to apply state or federal law should consider whether the issue at hand requires a nationally uniform body of law, whether the application of state law would frustrate the comprehensive and uniform federal law in the area, and finally whether the application of federal law would negatively affect the commercial relationships that exist within a state). *See generally* *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 650 (7th Cir. 1998) (assuming that federal common law applied to successor liability under CERCLA, and stating that most circuits have a preference toward federal common law to avoid frustrating the goals of CERCLA and limit forum shopping by liable parties for stricter standards with which to protect themselves); WARREN FREEDMAN, *FEDERAL STATUTES ON ENVIRONMENTAL PROTECTION: REGULATION IN THE PUBLIC INTEREST* 1 (1987) (stating that in the area of environmental protection, there is a need for "uniformity" of legal standards to address the dangers present from environmental degradation throughout the United States); LIGHT, *supra* note 21, at 110 (noting that federal judges should consider if the issue requires a "nationally uniform body of law" to accomplish CERCLA's goals when deciding which common law should apply). *But see* CHEREMISINOFF & GRAFFIA, *supra* note 68, at 29 (finding that even federal policy can differ across the United States, because different jurisdictions will apply and interpret concepts differently).

²¹⁷ *See Mobay Corp.*, 761 F. Supp. at 350; *see also* BUTLER & MACEY, *supra* note 214, at 17-25 (noting that the benefits to federal control of environmental issues are the detriments of state control and that they are: (1) interstate pollution might not adequately be taken into consideration by states when formulating environmental policies; (2) competition would occur among the states for the attraction of new businesses with the lure of lower environmental liability than other states, and (3) states might lack sufficient resources to administer and enforce the effective policing of state environmental regulations). *See generally id.* at 6 (arguing that federal standards in the environmental area are a product of the federal government's need to claim that it is protecting the environment so that all United States citizens may receive the benefits of a universally clean country).

²¹⁸ *See generally North Shore Gas Co.*, 152 F.3d at 651; *Mobay Corp.*, 761 F. Supp. at 350. *But see* BUTLER & MACEY, *supra* note 214, at 6 (arguing that federal standards in the

Proponents argue that a federal standard of veil piercing is the proper standard to apply in this context, because CERCLA was enacted to be a comprehensive and uniform statute to ensure hazardous waste clean up across the entire United States.²¹⁹ If states could choose the veil-piercing standard to be applied under CERCLA, the statute would not be uniformly applied and would thus frustrate the comprehensiveness of a federal statute.²²⁰

Finally, failure to designate a federal standard could raise yet another choice of law problem. If state law standards are applied, should courts look to the veil-piercing standards of the state of the parent's incorporation or the state in which the pollution took place?²²¹ Again, the concern is that there will be nonuniform application of a federal statute to potentially responsible parties.

2. Policies Supporting a State Veil-Piercing Standard

On the other side, federalism proponents argue that the states should be left to regulate corporations within their borders when a federal statute does not directly regulate an area.²²² They note that since CERCLA is silent as to derivative liability of a parent, states should be permitted to use their standard for veil piercing to determine such liability.²²³ Thus, federalism advocates argue that when an issue is not addressed by the federal government, the issue is properly left to the states.²²⁴ Therefore, even though CERCLA is a federal statute,

environmental area were a product of the federal government's need to claim that they were protecting the environment so that all United States citizens could receive the benefits of a universally clean country, and yet, federal regulations were enacted without regard to the fact that most environmental problems were and are local in nature).

²¹⁹ See *Mobay Corp.*, 761 F. Supp. at 350.

²²⁰ See *id.* at 351-52 (arguing that state law in this context could frustrate CERCLA by allowing responsible parties to avoid liability, and thus, diminish Superfund's resources and its ability to react to emergency clean up situations); *In re Acushnet*, 675 F. Supp. at 31 (arguing extensively that state standards should not frustrate CERCLA's goals, and that, thus, federal common law should be developed).

²²¹ See *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 865 (S.D. Ohio 1998) (suggesting that state law in the place of injury should be applied since it has the most significant relationship to the lawsuit).

²²² See *Donahey v. Bogle*, 129 F.3d 838, 843 (6th Cir. 1997) (stating that to pierce the corporate veil federal courts must consider the state corporation law of their jurisdiction); *Union Tank*, 29 F. Supp. 2d at 865 (same). See generally BUTLER & MACEY, *supra* note 214, at 7 (proposing state regulation for environmental issues to promote efficient use of natural resources).

²²³ See *Donahey*, 129 F.3d at 843; *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir. 1997); *Union Tank*, 29 F. Supp. 2d at 865.

²²⁴ See U.S. CONST. amend. X (reserving to the states powers that are not delegated to the federal government); see also LIGHT, *supra* note 21, at 110. Light argues that there is little need to fashion a uniform federal standard for every corporate liability issue that arises in a federal context. The norm in federal courts is instead to apply state law unless it imposes a burden on a

corporate law is generally a state law creation,²²⁵ which means that it is an area that has been left to the states to regulate. Veil-piercing standards are part of corporate law. Therefore, state law should apply in the absence of federal statutory law expressly directing another result.²²⁶

Federalism proponents also argue that the states should be permitted to apply their individual standards for veil piercing because different states have different preferences for environmental quality.²²⁷ Thus, some states will choose to apply a lenient veil-piercing standard—for example, one without a fraud requirement—in order to make it easier to find a parent liable to promote environmental interests and the goals of CERCLA.²²⁸ However, some states will apply a standard for parent liability that is strict—requiring a showing of fraud—to protect business interests and to give the state a competitive edge in attracting new businesses to incorporate within that state.²²⁹ Therefore, these proponents argue that without express congressional override, states should also be allowed to apply their own common law standard in this context to exemplify their individual preferences for environmental quality.²³⁰

Finally, they argue that a federal standard could also lead to “confusion and uncertainty”²³¹ as to which law should be applied when CERCLA intersects with other areas of state law such as state contract law.²³² There are examples of when

federal objective. In addition, there are examples of state law application in a CERCLA context where the objectives of the statute are not deemed to be frustrated. For example, state contract law is applied to determine if an indemnification contract is valid for the responsibility of paying clean-up costs. This might change who is required to pay for the costs of clean up. However, the goal of CERCLA will still be accomplished because individuals are still paying for the costs and the government is not being forced to absorb its externalities. *See id.*

²²⁵ *See* KLEIN & COFFEE, *supra* note 13, at 114 (“In general, the state saw itself as a partner in the corporate enterprise.”); LIGHT, *supra* note 21, at 109 (stating that corporations are the creation of state law and courts must determine the corporate common law for their jurisdiction).

²²⁶ *See generally* BUTLER & MACEY, *supra* note 214, at 1 (discussing the benefits of state regulation of environmental issues).

²²⁷ *See id.* at 15; LIGHT, *supra* note 21, at 109 (stating that corporations are the creations of state law and that state courts determine the corporate common law for that individual state).

²²⁸ *See* BUTLER & MACEY, *supra* note 214, at 15; CHEREMISINOFF & GRAFFIA, *supra* note 68, at 29 (stating that most environmental laws are given to states to enforce, but “enforcement attitudes” can differ across such states).

²²⁹ *See* CHEREMISINOFF & GRAFFIA, *supra* note 68, at 29; *see also* BUTLER & MACEY, *supra* note 214, at 14–15 (noting that with federal environmental standards, states do not have the opportunity to choose a less stringent standard based on the preferences and circumstances of the particular state).

²³⁰ *See* BUTLER & MACEY, *supra* note 214, at 15.

²³¹ LIGHT, *supra* note 21, at 111.

²³² *See id.* (noting the example of state contract law on indemnification contracts between a liable party and another party who contracts to pay the clean-up costs).

courts have applied state law to fill in other gaps in CERCLA.²³³ These proponents argue that if this was not the correct approach, then the federal courts should have developed and used federal common law to address these instances.²³⁴

3. Which Standard Is Correct?

Circuits are left with little direction as to which law should be applied to determine derivative liability under CERCLA. Courts can choose the standard they apply depending on some of the policy arguments presented in sections V.C.1-2.²³⁵

Despite the Supreme Court's failure to designate a veil-piercing standard, its dictum suggests that state law might well be appropriate.²³⁶ First, the Court allowed the Sixth Circuit's application of state law to stand and secondly, the Court seemed to support the notion that the corporate veil can be pierced only when there is a showing of fraud or other "wrongful purposes," which was required by the Michigan veil-piercing standard.²³⁷ In addition, the Court states that "the entire corpus of state corporation law is [not] to be replaced simply because a plaintiff's cause of action is based upon a federal statute."²³⁸

However, despite this dictum, a federal common law standard would be more appropriate for this context. CERCLA is a federal statute which was designed to be uniformly applied.²³⁹ If state standards of veil piercing were applied in this context, states could adopt standards that were particularly strict—such as requiring that the subsidiary be created to perpetuate fraud²⁴⁰—and thus, protect business interests to the detriment of protecting the environment and public

²³³ See *id.* See generally BUTLER & MACEY, *supra* note 214, at 4 (noting that federalization of environmental policies was a knee jerk reaction to the environmental crisis of the 1970s. Therefore, the choice for federal regulation was not a product of careful cost-benefit analysis, but of "political urgency." *Id.*

²³⁴ See LIGHT, *supra* note 21, at 110.

²³⁵ See *Browning-Ferris Indus. v. Ter Maat*, 13 F. Supp. 2d 756, 763–65 (N.D. Ill. 1998) (choosing to apply the state law veil-piercing standard of the state of incorporation for parent liability under CERCLA).

²³⁶ See *United States v. Bestfoods*, 524 U.S. 51, 60–63 (1998).

²³⁷ See *id.* See generally *United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997).

²³⁸ *Bestfoods*, 524 U.S. at 63 (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979)).

²³⁹ See *In re Acushnet River*, 675 F. Supp. 22, 30–32 (D. Mass. 1987) (making a strong argument that federal common law should be developed to fill in the gaps in CERCLA because there is a need for uniformity of application for its goals to be successful).

²⁴⁰ See *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 867–68 (S.D. Ohio 1998) (discussing why its old veil-piercing standard, which required a showing that the subsidiary was used to perpetrate fraud, was softened to allow veil piercing when it would be otherwise inequitable).

health.²⁴¹ CERCLA's goal was to protect these aspects by forcing liable parties to clean up the contaminated sites or compelling them to pay the costs when the government initiates the clean-up work.²⁴² If some states permit businesses to avoid such liability by enactment of a strict standard, then two things will result: (1) those states will have a lower level of environmental quality than citizens elsewhere, which the federal government, and federal taxpayers (including those from other states) will still be responsible for remediating; (2) responsible parents in those states will be forced to internalize the costs of such contamination less often than states which make it easier for the corporate veil to be pierced. Thus, the Superfund, under CERCLA, will be forced to pay more to states who require their business to internalize less. Under this scenario, CERCLA will not achieve its goals. Therefore, to make sure the goals of CERCLA are being accomplished, a federal common law standard should be developed with relatively lenient requirements. This will ensure that there is nationally uniform application of the standard and that CERCLA's goals are being adhered to and accomplished.²⁴³

VI. CONCLUSION

In conclusion, *Bestfoods* was a well-reasoned decision that attempted to be true to both traditional notions of corporate common law, by requiring that the corporate veil be pierced for a parent to be derivatively liable for the actions of its subsidiary, and the goals of CERCLA, to hold those responsible for the pollution liable for its costs. This decision changed the traditional analysis and forced the courts to look at the operation of the facility as directed by the words of CERCLA. Thus, if a parent is operating a facility, then it can be liable for the

²⁴¹ See BUTLER & MACEY, *supra* note 214, at 17-25. Butler is a proponent of state law application in the context of environmental issues, but he concedes that if state law was applied, states might fail to consider the potential impact their pollution could have on interstate interests. States could develop strict standards to protect their own businesses, but if their businesses are not forced to externalize the costs of clean up, then those costs must be born by someone and that someone is the government and the innocent taxpayers of the entire country. This leaves them at a serious disadvantage to business interests. States might also use such standards to compete for lucrative business interests without concern for the country's environmental well-being or the expense that failure to have liable parties (to contribute to the clean-up costs) will have on the environmental quality of the nation. Without liable parties, Superfund will be without clean-up resources or will be unable to afford enforcement proceedings. Thus, if allowing states to choose business interests over environmental quality seems to directly inhibit the goals of CERCLA. A strict veil-piercing standard allows parents to avoid liability. When their subsidiary's cannot absorb the liability costs, then the Superfund cannot react to emergency situations due to lack of funds and thus public health and environmental quality for the entire country is harmed.

²⁴² See generally *supra* Part II.A (examining the goals of CERCLA, including the initial reasons for its passage and the way in which it was crafted to accomplish its goals).

²⁴³ See *supra* note 216.

costs of clean up under CERCLA. The problem that the Court should have addressed to avoid further confusion is whether a state or a federal standard for veil piercing should apply to find a parent derivatively liable. Arguably, the more appropriate standard should be a federal standard, since CERCLA is a federal statute that was intended to be uniformly applied and state law standards might hinder this goal.